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No. 2436

United States
Circuit Court of Appeals

For the Ninth Circuit.

TIMOTHY HEALY,

Appellant,

vs.

SAMUEL W. BACKUS, as Commissioner of Immigration at the Port of San Francisco, for the United States Government,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Northern District of California,
First Division.

Filed

JUL 10 1914

F. D. Monckton,
Clerk.

No. 2436

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

TIMOTHY HEALY, for and on Behalf of BHAGAT SINGH et al. and SUNDAR or SANDU SINGH et al.,

Appellant,

vs.

SAMUEL W. BACKUS, as Commissioner of Immigration at the Port of San Francisco,
Appellee.

**Stipulation [for Omission of Exhibits from Printed
Record].**

It is hereby stipulated and agreed that the exhibits forming parts of the record in the court below and marked exhibits are to be omitted from the printed record on appeal in the above-entitled court, for the reason that those parts of the record below which are designated as exhibits are not necessary or material parts of the printed record in the above-entitled court, but may go up in their original form.

Omit pages from printed record as follows: Pages 13, 14, 15, 16, and all pages up to and including page 111; and omit from printed record pages 124 up to and including page 220.

JOHN W. PRESTON,

U. S. Attorney.

JOHN L. McNAB,

TIMOTHY HEALY,

Attorneys for Appellant.

[Endorsed]: 2436. In the United States Circuit Court of Appeals for the Ninth Circuit. Timothy

Healy for and on Behalf of Bhagat Singh et al., and Sundar or Sandu Singh et al., Appellants, vs. Samuel W. Backus, as Commissioner of Immigration at the Port of San Francisco, Appellee. Stipulation Re Exhibits. Filed Jun. 18, 1914. F. D. Monckton, Clerk.

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,479.

In the Matter of the Application of TIMOTHY HEALY for a Writ of Habeas Corpus for and on Behalf of RHAGAT SINGH, SOWAN SINGH, ARJAN SINGH, PARTAB SINGH, ASA SINGH, SAPURAN SINGH, SOBA SINGH, SHAM SINGH, VIRYAN SINGH, SOHN SINGH, NARON SINGH and GULAM NABI.

A N D

No. 15,480.

In the Matter of the Application of TIMOTHY HEALY for a Writ of Habeas Corpus for and on Behalf of SUNDAR or SANDU SINGH, NARON SINGH, BISHAN or BISHEN SINGH, FOMAN SINGH, JAGAT or JAGOT SINGH, JAMIT or JAWAT SINGH, MADA RAM or MADO PAN, FERROZ KHAN, MAHBUB or MAHBUT ALI, ABDOOLAH or ABDULLA KHAN.

(Style of Court, Titles and Numbers of Causes.)

Praeceptum [for Transcript of Record on Appeal].

To the Clerk of Said Court:

Sir: Please issue and make up record on appeal in the above-entitled causes to consist of petition for writ of habeas corpus, order to show cause, return to order to show cause, amended return to order to show cause, order denying writs of *habeas corpus* and opinion of the above-entitled court, petition and notice of appeal, assignment of errors, order allowing appeal, stipulation re exhibits and stipulation as to printing transcript on appeal.

Please take notice that the above-entitled court has made an order which is of record, which order is in conformity with the terms of a stipulation between the undersigned and Honorable J. W. Preston, United States Attorney for the Northern District of California, whereby it is agreed that the original exhibits in the above-entitled matter may be transmitted and made a part of the record on appeal, to the Circuit Court of Appeals for the Ninth Circuit.

JOHN L. McNAB,
TIMOTHY HEALY,
Attorneys for Appellants.

[Endorsed]: Filed Jan. 14, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

*Page number appearing at foot of page of original certified Record.

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 15,479.

In the Matter of the Application of TIMOTHY
HEALY for a Writ of Habeas Corpus for and
on Behalf of RHAGAT SINGH, SOWAN
SINGH, ARJAN SINGH, PARTAB SINGH,
ASA SINGH, SAPURAN SINGH, SOBA
SINGH, SHAM SINGH, VIRYAN SINGH,
SOHN SINGH, NARON SINGH and GU-
LAM NABI.

**Petition [in Case No. 15,479] for a Writ of Habeas
Corpus.**

To the Honorable M. T. DOOLING, Judge of the
Above-entitled Court.

The petition of Timothy Healy respectfully shows:

1.

That your petitioner is a resident of the City and
County of San Francisco, State of California, and
that he is an attorney at law and attorney of record
for RHAGAT SINGH, SOWAN SINGH, ARJAN
SINGH, PARTAB SINGH, ASA SINGH, SAPU-
RAN SINGH, SOBA SINGH, SHAM SINGH,
VIRYAN SINGH, SOHN SINGH, NARON SINGH
and GULAM NABI, for whom *and behalf* of whom
this petition is made.

2.

That the petition is made for and on behalf of
these twelve men thus grouped together for the rea-

son that they thus are grouped by the DEPARTMENT OF LABOR of the UNITED STATES.

3.

That for the convenience of the Court the persons for whom and upon whose behalf this petition is filed will be referred to herein as RHAGAT SINGH and ELEVEN OTHER HINDOOS.

4.

That the said RHAGAT SINGH and ELEVEN OTHER HINDOOS are *bona fide* domiciled residents, inhabitants and denizens of [2] the United States of America; that they were born in India and are subjects of Great Britain; that they came to the United States from the Republic of China, and were admitted after due inspection by the immigration officers at the Port of Manila and thereupon became and ever since have been and now are lawfully in the United States of America; that upon their arrival in Manila they paid the head tax required by the provisions of Immigration Act, February 20, 1907 (34 Stat. 898), as amended by the acts of March 26, 1910 (36 Stat. 263), and March 4, 1913, and the Immigration Rules of November 15, 1911.

5.

That after residing for various periods in Manila, Rhagat Singh and Eleven Other Hindoos signified to the immigration officers and the insular collector of customs at Manila an intention to go to the continent, and were furnished with certificates (Form 546-P. I.) as evidence of their regular entry at an insular port.

6.

That thereafter, in order to move from one part of the territory and jurisdiction of the United States of America, Rhagat Singh and Eleven Other Hindoos sailed from the Port of Manila as passengers on the steamship "Persia" to take up their residence and continue their domicile and remain denizens of the United States in another part of the territory and jurisdiction of the United States of America, and, on August 2, 1913, arrived in the Port of San Francisco.

7.

That the said Rhagat Singh and Eleven Other Hindoos are unlawfully imprisoned, detained, confined and restrained of their liberty by Samuel W. Backus, Commissioner of Immigration at the Port of San Francisco at the Immigration Station at Angel Island, California, or at some other place in the [3] Northern District of California, and are about to be deported to India from the United States and from the State of California and from their domicile and to be deprived of their residence and the privileges and immunities of denizens of the United States of America against their will and consent.

8.

That the illegality of such imprisonment, restraint, detention and confinement consists in this, to wit:

That the said Rhagat Singh and Eleven Other Hindoos were upon their arrival as passengers on the steamship "Persia" in the Port of San Francisco on July 29, 1913, arrested and taken into custody by the said Commissioner of Immigration; that subsequent to

their departure from one part of the jurisdiction and territory of the United States and their arrival in another part of the jurisdiction and territory of the United States and to their arrest in the Port of San Francisco, a warrant was issued by the Secretary of Labor of the United States whereby it was ordered that the said Rhagat Singh and Eleven Other Hindoos be deported to India, a copy of which warrant is hereto attached and made a part hereof and is marked Exhibit "A"; that the said Rhagat Singh and Eleven Other Hindoos are so imprisoned, detained, confined and restrained of their liberty by the said Commissioner of Immigration as aforesaid, and are about to be deported as aforesaid, and the said Commissioner claims the right to so imprison, detain, confine and restrain, and to so deport the said Rhagat Singh and Eleven Other Hindoos under and by virtue of the warrant of deportation.

That prior to the issuance of the said warrant of deportation the said Rhagat Singh and Eleven Other Hindoos were, and they have always been by said Commissioner and by the said Secretary of Labor refused and denied a fair hearing in good faith, such as is guaranteed them by law; and said warrant of deportation was issued by said Secretary of Labor by and through [4] a manifest abuse of the discretion committed to him by law and through errors and mistakes of law; and in that regard petitioner alleges:

1. That subsequent to the said entry into the United States of Rhagat Singh and Eleven Other Hindoos, and prior to the issuance of said warrant of

deportation, to wit, on July 29, 1913, the said Rhagat Singh and Eleven Other Hindoos were taken into custody by the said Commissioner, an application was made to the Secretary of Labor by Samuel W. Backus, Commissioner of Immigration, for a warrant for the arrest of the said Rhagat Singh and Eleven Other Hindoos, a copy of which application is attached hereto and made a part hereof and marked Exhibit "B"; in which said application it was charged that the said Rhagat Singh and Eleven Other Hindoos are liable to become public charges for the following reasons: That they are of the laboring class; that there is a strong prejudice against them, and that there exists no demand for such labor; that thereafter and on July 30, 1913, a warrant was issued by the then Acting Secretary of Labor for the arrest of the said Rhagat Singh and Eleven Other Hindoos, a copy of which warrant is hereto attached and made a part hereof and marked Exhibit "C," in which warrant it is charged "That the said aliens are members of the excluded classes in that they were persons likely to become public charges at the time of their entry into the United States."

2. That on the same day, July 30, 1913, the said Rhagat Singh, Sowam Singh, Arjan Singh, Partab Singh, Asa Singh, Sapuran Singh, Soba Singh, Sham Singh, Viryan Singh, Sohn Singh, Naron Singh and Gulam Nabi were, while detained and under arrest at said Immigration Station at Angel Island, examined by Examining Inspector R. E. Peabody, through an interpreter, which said examination was

reduced to a written record by an [5] official stenographer, a copy of which record is attached hereto and made a part hereof and marked Exhibit "D"; that at said examination the above-named subjects of examination answered to the best of their abilities all of the questions which were then propounded to them.

3. That the record of the above-mentioned examinations discloses upon its face that Rhagat Singh and Eleven Other Hindoos were not informed of the charges or allegations made against them or of the issuance of the warrants for their arrest until the conclusion of their examinations.

4. That at the above-mentioned examination the said Rhagat Singh and Eleven Other Hindoos were the only persons examined; no testimony or evidence of any kind or character other than that of the said Rhagat Singh and Eleven Other Hindoos was taken or offered; there has been no other, further or subsequent hearing of which Rhagat Singh and Eleven Other Hindoos or the attorneys of Rhagat Singh and Eleven Other Hindoos or your petitioner had any notice, knowledge or information.

5. That the said Rhagat Singh and Eleven Other Hindoos were informed by the said Examining Inspector R. E. Peabody at the conclusion of their examinations that "You are further informed that this hearing is given you for the purpose of giving you opportunity to show cause, if any you have, why you should not be deported," and that thereafter Rhagat Singh and Eleven Other Hindoos offered and filed with the said Samuel W. Backus, Commissioner

of Immigration, affidavits executed in due form by employers of labor in the State of California, in which the affiants, among them I. L. Borden, a member of the STATE BOARD OF AGRICULTURE OF THE STATE OF CALIFORNIA, declare on oath that they have vacancies and are anxious to employ more than five times the number of Hindoos in whose behalf this petition is filed, that they do not know of a single Hindoo in [6] America who has become a public charge and that there is steady employment for these men the year around, and that they know of no prejudice among employers of labor against this class of aliens, which affidavits are made a part hereof and marked Exhibit "E," being in the form of copies of the originals.

6. That the attorneys representing said Rhagat Singh and Eleven Other Hindoos, John L. McNab and Timothy Healy, were, and the said Rhagat Singh and Eleven Other Hindoos were thereupon informed by Commissioner of Immigration Samuel W. Backus, through Immigration Inspector F. H. Ainsworth, that the cases were closed and the record completed and ready for submission to the Secretary of Labor; and the said Commissioner of Immigration, Samuel W. Backus, through Immigration Inspector Ainsworth, invited the attorneys representing Rhagat Singh and Eleven Other Hindoos to file a brief if they so desired, in which brief the closed record and its contents might be discussed; and the said attorneys, John L. McNab filed a brief as part of the record, which brief is made a part hereof and is marked Exhibit "A"; that thereupon the said Sam-

uel W. Backus said the case would be at once sent to the Secretary of Labor for decision and judgment and that no further evidence and no further hearings or testimony would be introduced, held or heard on one side or the other; that at that time, on or about August 20th, 1913, there was no evidence to support the charges that Rhagat Singh and Eleven Other Hindoos ever had been or ever would become public charges or that they ever were or ever would be likely to become public charges.

7. That on September 25, 1913, your petitioner was informed by Immigration Inspector Frank H. Ainsworth at Angel Island that the record had not been closed on or about August 20, 1913, and had been ever since and was on September 25, 1913, open and being added to by the said Commissioner of Immigration [7] Samuel W. Backus; that neither Rhagat Singh and Eleven Other Hindoos, nor the attorneys of Rhagat Singh and Eleven Other Hindoos, nor any one of them, had any notice or knowledge that the record was being kept open.

8. That the said Samuel W. Backus detailed W. H. Chadney, an Immigration Inspector, and H. Schmoldt, a stenographer, to canvass the people of the State of California for evidence to support the charges made against the said Rhagat Singh and Eleven Other Hindoos; that no evidence was obtained, but that there was placed in the reopened record certain expressions of passion and prejudice culled from persons in various parts of the State of California in the form of affidavits, interviews and letters, made, given and written by persons un-

known to your petitioner or Rhagat Singh, in *ex parte* proceedings, and without Rhagat Singh and Eleven Other Hindoos or any of them or their attorneys having an opportunity to cross-examine the persons who made the affidavits, gave the interviews or wrote the letters; that the herein-mentioned affidavits, interviews and letters are made a part hereof and are marked Exhibit "G."

9. That Commissioner of Immigration Samuel W. Backus informed your petitioner on or about September 25 of the reopening of the record in the case of Rhagat Singh and Eleven Other Hindoos and invited a counter showing and additional brief on behalf of Rhagat Singh and Eleven Other Hindoos and the attorneys for Rhagat Singh and Eleven Other Hindoos filed for record a respectful, but earnest protest against the procedure adopted by the Department of Labor in reopening the record, and additional brief and additional evidence, which is made a part hereof and is marked Exhibit "H."

10. That thereafter, according to petitioner's information and belief, a certain so-called record was compiled by said Inspector Ainsworth under and by direction of said Commissioner [8] Samuel W. Backus, a complete copy of which said so-called record is contained, so far as your petitioner is informed and believes, in the said Exhibits "A," "B," "C," "D," "E," "F," "G" and "H," except that there are in addition thereto, according to your petitioner's information and belief, a certain document described as "the views in writing of the immigration officer in charge," which is not included here for

the reason that your petitioner, now Rhagat Singh and Eleven Other Hindoos nor the attorneys for Rhagat Singh and Eleven Other Hindoos ever have seen it; and there also is omitted from the copy of the record herewith about one thousand (1,000) newspaper columns of newspaper clippings of matters, views and reports of occurrences adverse and prejudicial to the interest of the Hindoos as a race, the reason for the omission being that the Asiatic Exclusion League of California, which organization furnished these clippings to the Department of Labor, have not another set to furnish to your petitioner, your petitioner believes, and as the clippings are from newspapers published in all sections of the United States, and bear dates from 1909 to the present time, it is a physical impossibility to duplicate those clippings; and Rhagat Singh and Eleven Other Hindoos have not sufficient funds to defray the expenses of copying that great volume of matter, about 99 per cent of which is printed in what is known as nonpareil or 6-point type; furthermore, your petitioner is informed by Inspector Ainsworth, and believes, that the Department of Labor is under promise to return the said estimated one thousand (1,000) columns of newspaper clippings adverse to the interests of the Hindoos as a race to the said Asiatic Exclusion League at the conclusion of the matter herewith brought before your Honorable Court, which is an additional reason for considering the newspaper clippings inaccessible to your petitioner; this so-called record and nothing more in regard to said Rhagat Singh and Eleven Other Hin-

doos was transmitted [9] to the said Secretary of Labor, your petitioner is informed and believes, the mode of transmission being by United States mail.

9.

That the said Secretary of Labor and the said Commissioner of Immigration refused and denied the said Rhagat Singh and Eleven Other Hindoos a fair hearing in good faith as alleged in paragraph 8 of this petition in this, to wit:

1. That the said warrant of deportation was so issued as aforesaid by the said Secretary of Labor upon and by a finding made by the said Secretary that the said Rhagat Singh and Eleven Other Hindoos are members of the excluded classes in that they were persons likely to become public charges at the time of their entry into the United States, and in this regard petitioner refers to Exhibits "A," "B," and "C"; that the said finding was so made and the said warrant of deportation was so issued by the said Secretary without any competent evidence having been submitted to him and without any competent evidence having been produced by the said Commissioner for the inspection of either of the said Rhagat Singh and Eleven Other Hindoos or their said attorneys, in which regard reference is hereby made to all the exhibits attached hereto.

2. That the said Commissioner reopened the record in the case of Rhagat Singh and Eleven Other Hindoos after it had been closed and introduced and caused to be incorporated into the record a document prepared by W. H. Chadney, Immigration Inspector, and a large number of affidavits, interviews

and writings of passion and prejudice, and in this regard reference is hereby made to Exhibit "G"; that counsel for said Rhagat Singh and Eleven Other Hindoos objected to the said reopening of the record and the introduction of said Exhibit "G," that said objection was overruled by said Commissioner and said documents were incorporated in the record which was subsequently [10] submitted to the said Secretary of Labor, and in this regard reference is made to Exhibit "G."

10.

That the said Secretary of Labor issued said warrant of deportation and so directed the deportation of said Rhagat Singh and Eleven Other Hindoos by and through a manifest abuse as alleged in paragraph 8, of the discretion committed to him by law, in this, to wit, for the same reasons and in the same manner as alleged in subdivisions 1, 2, and 3, of paragraph 8 of this petition, and in that regard petitioner makes the same allegations and references as are made in said subdivisions 1, 2, and 3, of paragraph 8.

11.

That the said Secretary of Labor issued said warrant of deportation and so directed the deportation of the said Rhagat Singh and Eleven Other Hindoos by and through errors and mistake of law as hereto alleged in paragraph 8 hereof, in this, to wit, for the same reasons and in the same manner set forth in subdivisions 1, 2, and 3, of paragraph 8, and in that regard petitioner makes the same allegations and the same references as are contained in said subdivisions 1, 2, and 3 of paragraph 8 of this petition.

12.

That the said Rhagat Singh and Eleven Other Hindoos have exhausted all their rights and remedies before the Department of Labor; that the said warrant of deportation is final as the judgment of said Department of Labor, and that there is no appeal therefrom provided by law; that unless a writ of habeas corpus issues out of this Court directed to the said Samuel W. Backus, Commissioner of Immigration as aforesaid, to whom the said warrant of deportation was directed, and in whose custody the body of the said Rhagat Singh and the bodies of Eleven Other Hindoos are, the said Rhagat Singh and Eleven Other Hindoos [11] will forthwith be deported from the United States to India.

WHEREFORE, your petitioner prays that a writ of habeas corpus be issued by this Honorable Court commanding said Samuel W. Backus, Commissioner of Immigration at the Port of San Francisco, to have and to produce the bodies of the said Rhagat Singh and Eleven Other Hindoos before this Honorable Court at its courtroom in the City and County of San Francisco, in the Northern District of California, at the beginning of Court on a day certain, in order that the alleged cause of imprisonment and restraint of the said Rhagat Singh and Eleven Other Hindoos, and the legality or illegality thereof, may be inquired into, and in order that, in case the said imprisonment and restraint are unlawful and illegal, the said Rhagat Singh and Eleven Other Hindoos be discharged from all custody and restraint, or that the said Rhagat Singh and Eleven Other Hindoos be admitted

to just and reasonable bail pending all proceedings herein.

Dated this 17th day of October, 1913.

TIMOTHY HEALY,
Petitioner.

JOHN L. McNAB,
TIMOTHY HEALY,
Attorneys for Rhagat Singh and Eleven Other
Hindoos.

State of California,
City and County of San Francisco,—ss.

Timothy Healy, being duly sworn, deposes and says: That he is the petitioner named in the above and foregoing petition; that he has heard the same read and knows the contents thereof; that the same is true of his own knowledge except as to those things which are therein stated on his information and belief and as to those things he believes it to be true.

TIMOTHY HEALY,

Subscribed and sworn to before me this 17th day of October, 1913.

[Seal] LLOYD MACOMBER,
Notary Public in and for the City and County of San
Francisco, State of California. [12]

In the District Court of the United States in and for the Northern District of California, First Division.

No. 15,480.

In the Matter of the Application of TIMOTHY HEALY for a Writ of Habeas Corpus for and on Behalf of SUNDAR or SANDU SINGH, NARON SINGH, BISHAN or BISHEN SINGH, FOMAN SINGH, JAGAT or JAGOT SINGH, JAMIT or JAWAT SINGH, MADA RAM or MADO PAN, FERROZ KHAN, MAHBUB or MAHBUT ALI, ABDOOLAH or ABDULLA KHAN.

Petition [in Case No. 15,480] for a Writ of Habeas Corpus.

To the Honorable M. T. DOOLING, Judge of the Above-entitled Court.

The petition of Timothy Healy respectfully shows:

1.

That your petitioner is a resident of the City and County of San Francisco, State of California, and that he is an attorney at law and attorney of record for SUNDAR or SANDU SINGH, NARON SINGH, BISHAM or BISHEN SINGH, FOMAN SINGH, JAGAT or JAGOT SINGH, JAMIT or JAWAT SINGH, MADA RAM or MADO PAN, FERROZ KHAN, MAHBUB or MAHBUT ALI, ABDOOLAH or ABDULLA KHAN for whom and behalf of whom this petition is made.

2.

That the petition is made for and on behalf of

these ten men thus grouped together for the reason that they thus are grouped by the DEPARTMENT OF LABOR OF THE UNITED STATES.

3.

That for the convenience of the Court the persons [112] for whom and upon whose behalf this petition is filed will be referred to herein as SUNDAR SINGH and NINE OTHER HINDOOS.

4.

That the said Sundar Singh and Nine Other Hindoos are *bona fide* domiciled residents, inhabitants and denizens of the United States of America; that they were born in India and are subjects of Great Britain; that they came to the United States from the Republic of China, and were admitted after due inspection by the immigration officers at the Port of Manila and thereupon became and ever since have been and now are lawfully in the United States of America; that upon their arrival in Manila they paid the head tax required by the provisions of Immigration Act, February 20, 1907 (34 Stat. 898), as amended by the acts of March 26, 1910 (36 Stat. 263), and March 4, 1913, and the Immigration Rules of November 15, 1911.

5.

That after residing for various periods in Manila Sundar Singh and Nine Other Hindoos signified to the Immigration Officers and the insular collector of customs at Manila an intention to go to the continent and were furnished with certificates (Form 546-P. I.) as evidence of their regular entry at an insular port.

6.

That thereafter, in order to move from one port to the territory and jurisdiction of the United States of America, Sundar Singh and Nine Other Hindoos sailed from the Port of Manila as passengers on the steamship "Korea" to take up their residence and continue their domicile and remain denizens of the United States in another part of the territory and jurisdiction of the United States of America and, on August 2, 1913, arrived in the Port of San Francisco.

7.

That the said Sundar Singh and Nine Other Hindoos are [113] unlawfully imprisoned, detained, confined and restrained of their liberty by Samuel W. Backus, Commissioner of Immigration at the Port of San Francisco, at the Immigration Station at Angel Island, California, or at some other place in the Northern District of California, and are about to be deported to India from the United States and from the State of California and from their domicile and to be deprived of their residence and the privileges and immunities of denizens of the United States of America against their will and consent.

8.

That the illegality of such imprisonment, restraint, detention and confinement consists in this, to wit:

That the said Sundar Singh and Nine Other Hindoos were upon their arrival as passengers on the steamship "Korea" in the Port of San Francisco on August 2, 1913, arrested and taken into custody by the said Commissioner of Immigration; that subsequent to their departure from one part of the juris-

diction and territory of the United States and their arrival in another part of the jurisdiction and territory of the United States and to their arrest in the Port of San Francisco, a warrant was issued by the Secretary of Labor of the United States, whereby it was ordered that the said Sundar Singh and Nine Other Hindoos be deported to India, a copy of which warrant is hereto attached and made a part hereof and is marked Exhibit "A"; that the said Sundar Singh and Nine Other Hindoos are so imprisoned, detained, confined and restrained of their liberty by the said Commissioner of Immigration as aforesaid, and are about to be deported as aforesaid, and the said Commissioner claims the right to so imprison, detain, confine and restrain, and to so deport the said Sundar Singh and Nine Other Hindoos under and by virtue of the warrant of deportation.

That prior to the issuance of the said warrant of deportation the said Sundar Singh and Nine Other Hindoos was, and they have always been by said Commissioner and by the said [114] Secretary of Labor refused and denied a fair hearing in good faith, such as is guaranteed them by law; and said warrant of deportation was issued by said Secretary of Labor by and through a manifest abuse of the discretion committed to him by law and through errors and mistakes of law; and in that regard petitioner alleges.

1. That subsequent to the said entry into the United States of Sundar Singh and Nine Other Hindoos, and prior to the issuance of said warrant of deportation, to wit, on August 5, 1913, three days

after the said Sundar Singh and Nine Other Hindoos were taken into custody by the said Commissioner, an application was made to the Secretary of Labor by Samuel W. Backus, Commissioner of Immigration, for a warrant for the arrest of the said Sundar Singh and Nine Other Hindoos, a copy of which application is attached hereto and made a part hereof and marked Exhibit "B"; in which said application it was charged that the said Sundar Singh and Nine Other Hindoos are liable to become public charges for the following reasons: That they are of the laboring class; that there is a strong prejudice against them, and that there exists no demand for such labor; that thereafter and on August 5, 1913, a warrant was issued by the then Acting Secretary of Labor for the arrest of the said Sundar Singh and Nine Other Hindoos, a copy of which warrant is hereto attached and made a part hereof and marked Exhibit "C," in which warrant it is charged "That the said aliens are members of the excluded classes in that they were persons likely to become public charges at the time of their entry into the United States."

2. That on the same day, August 5, 1913, the said Sundar or Sandu Singh, Naron Singh, Bisham or Bishen Singh, Foman Singh, Jagat or Jagot Singh, Jamit or Jawat Singh, Mada Ram or Mado Pan, Ferroz Khan and Abdoolah or Abdullar Khan, and on August 12, 1913, Mahbub or Mahbut Ali, were, while detained and under arrest at said Immigration Station at Angel Island, examined by [115] Examining Inspector R. E. Peabody, through an interpreter, which said examination was reduced to a

written record by an official stenographer, a copy of which record is hereto attached hereto and made a part hereof and marked Exhibit "D"; that at said examinations the above-named subjects of examination answered to the best of their abilities all of the questions which were then propounded to them.

3. That the record of the above-mentioned examinations discloses upon its face that Sundar Singh and Nine Other Hindoos were not informed of the charges or allegations made against them or of the issuance of the warrants for their arrest until the conclusion of their examinations.

4 and 5. That at the above-mentioned examinations the said Sundar Singh and Nine Other Hindoos were the only persons examined; no testimony or evidence of any kind or character other than that of the said Sundar Singh and Nine Other Hindoos was taken or offered; there has been no other, further or subsequent hearing of which Sundar Singh and Nine Other Hindoos or the attorneys of Sundar Singh and Nine Other Hindoos or your petitioner had any notice, knowledge or information.

6. That the said Sundar Singh and Nine Other Hindoos were informed by the said Examining Inspector, R. E. Peabody, at the conclusion of their examinations that "You are further informed that this hearing is given you for the purpose of giving you opportunity to show cause, if any you have, why you should not be deported," and that thereafter Sundar Singh and Nine Other Hindoos offered and filed with the said Samuel W. Backus, Commissioner of Immigration, affidavits executed in due form by

employers of labor in the State of California, in which the affiants, among them I. L. Borden, a member of the STATE BOARD OF AGRICULTURE OF THE STATE OF CALIFORNIA, declare on oath that they have vacancies and are anxious to employ more than five times the number of Hindoos in whose behalf this petition is filed, that they do not know of a [116] single Hindoo in America who has become a public charge and that there is steady employment for these men the year around, and that they know of no prejudice among employers of labor against this class of aliens, which affidavits are made a part thereof and marked Exhibit "E," being in the form of copies of the originals.

7. That the attorneys representing said Sundar Singh and Nine Other Hindoos, John L. McNab and Timothy Healy, were, and the said Sundar Singh and Nine Other Hindoos were thereupon informed by Commissioner of Immigration, Samuel W. Backus, through Immigration Inspector, F. H. Ainsworth, that the cases were closed and the record completed and ready for submission to the Secretary of Labor; and the said Commissioner of Immigration, Samuel W. Backus, through Immigration Inspector Ainsworth, invited the attorneys representing Sundar Singh and Nine Other Hindoos to file a brief if they so desired, in which brief the closed record and its contents might be discussed; and the said attorneys, John L. McNab filed a brief as part of the record, which brief is made a part hereof and is marked Exhibit "F"; that thereupon the said Samuel W. Backus, said the case would be at once sent to the

Secretary of Labor for decision and judgment and that no further evidence and no further hearings or testimony would be introduced, held or heard on one side or the other; that at that time, on or about August 20, 1913, there was no evidence to support the charges that Sundar Singh and Nine Other Hindoos ever had been or ever would become public charges or that they ever were or ever would be likely to become public charges.

8. That on September 25, 1913, your petitioner was informed by Immigration Inspector, Frank H. Ainsworth at Angel Island that the record had not been closed on or about August 20, 1913, and had been ever since and was on September 25, 1913, open and being added to by the said Commissioner of Immigration Samuel W. Backus; that neither Sundar Singh and [117] Nine Other Hindoos, nor the attorneys of Sundar Singh and Nine Other Hindoos, nor any one of them, had any notice or knowledge that the record was being kept open.

9. That the said Samuel W. Backus detailed W. H. Chadney an Immigration Inspector, and H. Schmedt, a stenographer to canvass the people of the State of California for evidence to support the charges made against the said Sundar Singh and Nine Other Hindoos; that no evidence was obtained, but that there was placed in the reopened record certain expressions of passion and prejudice culled from persons in various parts of the State of California in the form of affidavits, interviews and letters, made, given and written by persons unknown to your petitioner or Sundar Singh, in *ex parte* proceedings, and

without Sundar Singh and Nine Other Hindoos, or any of them or their attorneys having an opportunity to cross-examine the persons who made the affidavits, gave the interviews or wrote the letters; that the herein mentioned affidavits, interviews and letters are made a part hereof and are marked Exhibit "G."

9. That Commissioner of Immigration, Samuel W. Backus, informed your petitioner on or about September 25 of the reopening of the record in the case of Sundar Singh and Nine Other Hindoos and invited a counter showing and additional brief on behalf of Sundar Singh and Nine Other Hindoos, and the attorneys for Sundar Singh and Nine Other Hindoos filed for record a respectful, but earnest protest against the procedure adopted by the Department of Labor in reopening the record, and additional brief and *addition* evidence, which is made a part hereof and is marked Exhibit "H."

10. That thereafter, according to petitioner's information and belief, a certain so-called record was compiled by said Inspector Ainsworth under and by direction of said Commissioner Samuel W. Backus, a complete copy of which said so-called record is contained, so far as your petitioner is informed and [118] believes, in the said Exhibits "A," "B," "C," "D," "E," "F," "G," and "H," except that there are in addition thereto, according to your petitioner's information and belief, a certain document described as "the views in writing of the immigration officer in charge," which is not included here, for the reason that your petitioner nor Sundar Singh and Nine

Other Hindoos nor the attorneys for Sundar Singh and Nine Other Hindoos ever have seen it; and there also is omitted from the copy of the record herewith about one thousand (1,000) newspaper columns of newspaper clippings of matters, views and reports of occurrences adverse and prejudicial to the interest of the Hindoos as a race, the reason for the omission being that the Asiatic Exclusion League of California, which organization furnished these clippings to the Department of Labor, have not another set to furnish to your petitioner, your petitioner believes, and as the clippings are from newspapers published in all sections of the United States, and bear dates from 1909 to the present time, it is a physical impossibility to duplicate those clippings; and Sundar Singh and Nine Other Hindoos have not sufficient funds to defray the expenses of copying that great volume of matter, about 99 per cent of which is printed in what is known as nonpareil or 6-point type; furthermore, your petitioner is informed by Inspector Ainsworth, and believes, that the Department of Labor is under promise to return the said estimated one thousand (1,000) columns of newspaper clippings adverse to the interests of the Hindoos as a race to the said Asiatic Exclusion League at the conclusion of the matter herewith brought before your Honorable Court, which is an additional reason for considering the newspaper clippings inaccessible to your petitioner; this so-called record and nothing more in regard to said Sundar Singh and Nine Other Hindoos was transmitted to the said Secretary of Labor, your [119] petitioner is informed and believes, the mode

of transmission being by United States Mail.

9.

That the said Secretary of Labor and the said Commissioner of Immigration refused and denied the said Sundar Singh and Nine Other Hindoos a fair hearing in good faith as alleged in paragraph 8 of this petition in this, to wit:

1. That the said warrant of deportation was so issued as aforesaid by the said Secretary of Labor upon and by a finding made by the said Secretary that the said Sundar Singh and Nine Other Hindoos are members of the excluded classes in that they were persons likely to become public charges at the time of their entry into the United States, and in this regard petitioner refers to Exhibits "A," "B" and "C"; that the said finding was so made and the said warrant of deportation was so issued by the said Secretary without any competent evidence having been submitted to him and without any competent evidence having been produced by the said Commissioner for the inspection of either of the said Sundar Singh and Nine Other Hindoos or their said attorneys, in which regard reference is hereby made to all the exhibits attached hereto.

2. That the said Commissioner reopened the record in the case of Sundar Singh and Nine Other Hindoos after it had been closed and introduced and caused to be incorporated into the record a document prepared by W. H. Chadney, Immigration Inspector, and a large *number affidavits*, interviews and writings of passion and prejudice, and in this regard reference is hereby made to Exhibit "G"; that coun-

sel for said Sundar Singh and Nine Other Hindoos objected to the said reopening of the record and the introduction of said Exhibit "G"; that said objection was overruled by said Commissioner and said documents were incorporated in the record which was [120] subsequently submitted to the said Secretary of Labor, and in this regard reference is made to Exhibit "G."

10.

That the said Secretary of Labor issued said warrant of deportation and so directed the deportation of said Sundar Singh and Nine Other Hindoos by and through a manifest abuse as alleged in paragraph 8, of the discretion committed to him by law, in this, to wit: For the same reasons and in the same manner as alleged in subdivisions 1, 2, and 3 of paragraph 8 of this petition, and in that regard petitioner makes the same allegations and references as are made in said subdivisions 1, 2, and 3 of paragraph 8.

11.

That the said Secretary of Labor issued said warrant of deportation and so directed the deportation of the said Sundar Singh and Nine Other Hindoos by and through errors and mistake of law as hereto alleged in paragraph 8 hereof, in this, to wit: For the same reasons and in the same manner set forth in subdivisions 1, 2, and 3 of paragraph 8, and in that regard petitioner makes the same allegations and the same references as are contained in said subdivisions 1, 2 and 3 of paragraph 8 of this petition.

12.

That the said Sundar Singh and Nine Other Hin-

doos has exhausted all their rights and remedies before the Department of Labor; that the said warrant of deportation is final as the judgment of said Department of Labor, and that there is no appeal therefrom provided by law; that unless a writ of *habeas corpus* issues out of this court directed to the said Samuel W. Backus, Commissioner of Immigration as aforesaid, to whom the said warrant of deportation was directed, and in whose custody the body of the said Sundar Singh and the bodies of Nine Other Hindoos are, the said Sundar Singh and Nine [121] Other Hindoos will forthwith be deported from the United States to India.

WHEREFORE, your petitioner prays that a writ of *habeas corpus* be issued by this Honorable Court commanding said Samuel W. Backus, Commissioner of Immigration at the Port of San Francisco, to have and to produce the bodies of the said Sundar Singh and Nine Other Hindoos before this Honorable Court at its courtroom in the City and County of San Francisco, in the Northern District of California, at the beginning of court on a day certain, in order that the alleged cause of imprisonment and restraint of the said Sundar Singh and Nine Other Hindoos and the legality or illegality thereof may be inquired into, and in order that, in case the said imprisonment and restraint are unlawful and illegal, *to* said Sundar Singh and Nine Other Hindoos be discharged from all custody and restraint, or that the said Sundar Singh and Nine Other Hindoos be admitted to just and reasonable bail pending all proceedings herein.

Dated this 17th day of October, 1913.

TIMOTHY HEALY,
Petitioner.

JOHN L. McNAB,
TIMOTHY HEALY,

Attorneys for Sundar Singh and Nine Other Hindoos. [122]

State of California,

City and County of San Francisco,—ss.

Timothy Healy, being duly sworn, deposes and says: That he is the petitioner named in the above and foregoing petition; that he has heard the same read and knows the contents thereof; that the same is true of his own knowledge except as to those things which are therein stated on his information and belief, and as to those things he believes it to be true.

[Seal]

TIMOTHY HEALY.

Subscribed and sworn to before me this 17th day of October, 1913.

LLOYD MACOMBER,

Notary Public in and for the City and County of San Francisco, State of California. [123]

(Style of Court, Title and Number of Cause.)

Order to Show Cause [in Case No. 15,479].

Upon consideration of the Petition, it is ordered that the respondent, the Commissioner of Immigration at the Port of San Francisco, show cause in this court at the courtroom thereof in the City and County of San Francisco, at 2 o'clock P. M. on Monday, the 20 day of October, 1913, why the writ of

habeas corpus should not issue as prayed for by the petitioner.

Let a copy of this order be served forthwith upon said respondent and upon the United States Attorney for this District, and that deportation be stayed.

October 18th, 1913.

M. T. DOOLING,

Judge of the United States District Court.

[Endorsed]: Filed Oct. 18, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [221]

(Style of Court, Title and Number of Cause.)

Order to Show Cause [in Case No. 15,480].

Upon consideration of the petition, it is ordered that the respondent, the Commissioner of Immigration at the Port of San Francisco, show cause in this court at the courtroom thereof, in the City and County of San Francisco, at 2 o'clock P. M. on Monday, the 20 day of October, 1913, why the writ of *habeas corpus* should not issue as prayed for by the petitioner.

Let a copy of this order be served forthwith upon said respondent and upon the United States Attorney for this District, and that deportation be stayed.

October 18th, 1913.

M. T. DOOLING,

Judge of the United States District Court.

[Endorsed]: Filed Oct. 18, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [222]

(Style of Court, Title and Number of Cause.)

Return [to Order to Show Cause in Case No. 15,479].

Now comes Samuel W. Backus, Commissioner of Immigration at the Port of San Francisco, by Charles D. Mayer, Immigrant Inspector, and in return to the Order to Show Cause issued by said Court on the Petition of Timothy Healy for a writ of *habeas corpus*, respectfully shows that your respondent holds RHAGAT SINGH, SOWAN SINGH, ARJAN SINGH, PARTAB SINGH, ASA SINGH, SAPURAN SINGH, SOBA SINGH, SHAM SINGH, VIRYAN SINGH, SOHN SINGH, NARON SINGH, and GULAM NABI under an order of deportation signed and issued by the Honorable Secretary of Labor, and dated October 10th, 1913.

I.

Respondent admits each and every allegation contained in paragraphs 1, 2, and 3 of the Petition, except that in paragraph 3 respondent denies that the alien Hindoos were *bona fide* residents of the United States, or that they are lawfully in the United States.

II.

Respondent admits each and every allegation contained in paragraphs 5, 6, and 7 of the Petition, except that in paragraph 7 thereof respondent denies that the alien Hindoos are unlawfully imprisoned, detained, confined and restrained of their liberty.

III.

Respondent admits each and every allegation [223] contained in the introductory statement of paragraph 8 of the Petition.

Respondent admits each and every allegation of subdivisions 1 and 2 of paragraph 8 of the Petition, but denies that the Hindoos did answer fully and to the best of their ability the questions put to them at the examination before Immigrant Inspector R. E. Peabody on July 30, 1913.

Respondent admits each and every allegation of subdivision 3 of paragraph 8 of Petition, but alleges further that such action was in accordance with rule 22, subdivision 4, of the Immigration Regulations, which provides that the applicant need not be informed of the charges against him until the end of the preliminary hearing.

Respondent denies each and every allegation of subdivision 4 of paragraph 8 of the Petition.

Respondent admits each and every allegation in subdivision 5 of paragraph 8 of the Petition, but alleges further that with the exception of the affidavit of I. L. Borden, and two others, all of the affidavits put in evidence by petitioner, were made by Hindoos. Respondent alleges further that affidavits of state and county officials throughout the State of California were made opposing the admission of Hindoos into the United States. The names and respective offices of some of such affiants are as follows:

Paul Sharrenberg, Secretary Treasurer California
State Federation of Labor: [224]

John P. McLaughlin, Commissioner of Labor for the
State of California.

F. E. Sullivan, General Manager Spreckels Sugar
Co.

- H. E. Davis, Under-sheriff, Monterey Co., Cal.
T. J. Vitaich, Business Agent, San Joaquin County
Central Labor Council.
Frank B. Braire, Chief of Police, Stockton, Cal.
Wm. Johnson, Chief of Police, Sacramento, Cal.
Eugene S. Wachhorst, District Attorney, Sacra-
mento, Cal.
George E. Gee, Secretary Yuba County Trades Coun-
cil.
J. P. Onstott, Farmer, Yuba City, Cal.
Charles J. McCoy, Chief of Police, Marysville, Cal.
P. Brannan, Special Officer, Marysville, Cal.
Harry E. Hyde, Mayor, Marysville, Cal.
J. V. Parks, Justice of the Peace, Oroville, Cal.
Wm. Lewis Kurran, Marshal, Oroville, Cal.
James J. Wood, Theatre Manager, Chico, Cal.
C. E. Daly, Merchant, Chico, Cal.
H. Moir, Postmaster, Chico, Cal.
F. J. Nottelmann, Merchant, Chico, Cal.
J. N. Kelly, Merchant, Chico, Cal.
M. G. Polk, County Surveyor, Butte Co., Cal.
Lon Bond, Attorney, Chico.
J. L. Barnes, Justice of the Peace, Chico, Cal.
M. H. Goe, Marshal, Chico, Cal.
Wm. Robbie, Mayor, Chico, Cal.
E. C. Hamilton, Manager Sacramento Valley Sugar
Co.
Geo. A. Dean, Secretary San Joaquin County Central
Labor Council.
H. Hamer, Immigrant Inspector, Bellingham, Wash.

[225]

The consensus of opinion as set forth by these affi-

davits which are appended to the Petition as exhibits is to the effect that the Hindoo is an undesirable citizen; that he is filthy, unsanitary, immoral, gives the officials continuous trouble by becoming intoxicated and subject to arrest; that he is a disagreeable member of every community because of his uncleanness and offensive odor; that he becomes a public nuisance in crowding the sidewalks, street corners, postoffices and other public buildings; that merchants, theatrical managers and business men generally exclude him from their places of business; that the Hindoo is unreliable; that he is a petty thief, nomadic in his habits, will not remain employed in any particular work unless under a strict contract; that his standard of living is of the very lowest and that he does not rear families or permanently establish himself in the country in which he works; that he is a degenerate physically, and generally in a weak and enervated condition, and invariably afflicted with the disease of hookworm; that the Hindoo belongs to the laboring class; that demand for Hindoo labor is very limited, and if desired at all is only for transient periods, and because of the strong prejudice against him, and the fact that he is continually a public nuisance and a burden to all society, it is deemed by all the affiants above named that he is likely to become a public charge, and that he should be expelled from the country.

Respondent denies each and every allegation in [226] subdivisions 6 and 7 of paragraph 8 of the Petition.

Respondent admits each and every allegation of

subdivision 8 of paragraph 8 of the Petition, with the exception that he denies that the affidavits are merely an expression of passion and prejudice culled from persons in various parts of the State of California, but that the affidavits were *bona fide* expressions of opinion of white merchants and officials in possession of experience and influence, and having come in direct contact with Hindoo laborers.

Respondent admits each and every allegation in subdivision 9 of paragraph 8 of the Petition, and especially admits that the petitioner was allowed to file further evidence in the hearing before the Commissioner of Immigration, but respondent denies that any protest was made to such reopening of the case, except in a final brief filed by said petitioner, and that in a letter signed by one of the attorneys for petitioner, dated September 27th, 1913, directed to Samuel W. Backus, Commissioner of Immigration at Angel Island, California, the statement was made that the attorneys for the petitioner acquiesced in the reopening of the case for further admission of evidence, and thanked the Commissioner for the courtesy in doing so.

IV.

Respondent denies each and every allegation set forth in paragraph 9 of the Petition, and especially denies that any competent evidence was submitted to the Commissioner of Immigration that the said Hindoos were likely to become public charges.

[227]

Respondent admits each and every allegation in subdivision 2 of paragraph 9 of the Petition, with the

exception that he denies that the affidavits filed on behalf of respondent were prejudiced, and further denies that the reopening of the case and the record was protested by the attorneys for the alien Hindoos.

V.

Respondent denies each and every allegation set forth in paragraph 10 of the Petition.

VI.

Respondent denies each and every allegation set forth in paragraph 11 of the Petition.

VII.

Respondent admits each and every allegation set forth in paragraph 12 of said Petition.

WHEREFORE, your respondent prays that a writ of *habeas corpus* do not issue herein, that the Order to Show Cause be discharged, and that the Petition be dismissed.

BENJ. L. McKINLEY,

United States Attorney,

Attorney for Respondent.

WALTER E. HETTMAN,

Assistant U. S. Attorney,

Of Counsel. [228]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Charles D. Mayer, being first duly sworn deposes and says:

That he is an Immigrant Inspector connected with the Immigration Service for the port of San Francisco, and has been specially directed to appear for, and represent the respondent, Samuel W. Backus,

Commissioner of Immigration, in the within entitled matter; that he is familiar with all the facts set forth in the within Return to Order to Show Cause, and knows the contents thereof; that it is impossible for the said Samuel W. Backus to appear in person or to give his attention to said matter; that of affiant's own knowledge, the matter set forth in the Return to Order to Show Cause are true, excepting those matters which are stated on information and belief, and that as to those matters, he believes it to be true.

CHARLES D. MAYER.

Subscribed and sworn to before me this 13th day of November, 1913.

[Seal]

FRANCIS KRULL,
Deputy Clerk U. S. District Court, Northern District
of California.

Service of the within return by copy admitted this 14th day of Nov., 1913.

T. HEALY,

J. L. McNAB,

Attorneys for Petitioner.

[Endorsed]: Filed Nov. 14, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [229]

(Style of Court, Title, and Number of Cause.)

**Amended Return [to Order to Show Cause in Case
No. 15,479].**

Now comes Samuel W. Backus, Commissioner of Immigration at the port of San Francisco, by Charles D. Mayer, Immigrant Inspector, and in return to the Order to Show Cause issued by said Court

on the petition of Timothy Healy for a writ of *habeas corpus*, respectfully shows that your respondent holds BHAGAT SINGH, SOWAN SINGH, ARJAN SINGH, PARTAB SINGH, ASA SINGH, SAPURAN SINGH, SOBA SINGH, SHAM SINGH, VIRYAN SINGH, SOHN SINGH, NARON SINGH, and GULAM NABI, all of whom are aliens under orders of deportation signed and issued by the Honorable Acting Secretary of Labor, dated October 10th, 1913, after a due and proper consideration of the record in the case of each of said aliens by the said Acting Secretary of Labor. [230]

I.

As to paragraph 3 of the petition, respondent denies that said BHAGAT SINGH, and said eleven other aliens are *bona fide* domiciled residents, inhabitants and denizens of the United States of America; admits that they were born in India and are subjects of Great Britain; admits that they came from the Republic of China to an insular possession of the United States, namely, the Philippine Islands, and were admitted thereto at the port of Manila, but denies that they were admitted after due inspection by Immigration officers and thereupon became and ever since have been and now are lawfully in the United States of America; admits that upon their arrival at Manila they paid the head tax required by the Immigration laws and rules.

II.

As to paragraph 5 of the petition, respondent admits that said Bhagat Singh and the said eleven other aliens signified to the Insular Collector of Customs

at Manila an intention to go to the continent, and were furnished with certificates (Form 546-P. I.) as evidence of their entry at an insular port.

III.

As to paragraph 6 of the petition, respondent admits that said Bhagat Singh and the said eleven other aliens sailed from the port of Manila as passengers on the steamship "Persia" to the port of San Francisco, but denies that any of said aliens had ever acquired a residence or a domicile in any part of the territory of the United States that they could have taken up or continued as denizens of the United States, by said sailing from the port of Manila to the port of San Francisco. [231]

IV.

As to paragraph 7 of the petition, respondent denies that the said Bhagat Singh, or any of said eleven other aliens were unlawfully imprisoned, detained, confined or restrained of their liberty by respondent; admits that they were about to be deported to India from the United States and from the State of California when the said petition was filed; denies that such contemplated deportation would have been from their domicile and would have deprived any of them of a lawful residence, or of any privilege or immunity whatsoever.

V.

As to paragraph 8 of the petition, respondent admits that said Bhagat Singh and said eleven other aliens were taken into custody on July 29, 1913, by respondent, that the warrant of deportation referred to was issued by the Acting Secretary of Labor, and

that he claims the right to hold in custody and to deport said Bhagat Singh and each of said eleven other aliens under and by virtue of the said warrant of deportation.

Respondent denies that said Bhagat Singh, or any of said eleven other aliens were, prior to the issuance of the said warrant of deportation, or have been at any time, refused or denied a fair hearing in good faith, such as is guaranteed them by the law, by respondent or said Acting Secretary of Labor.

Respondent denies that said warrant of deportation was issued by the Secretary of Labor by and through a manifest abuse of discretion committed by him by law and through errors and mistakes of law, but, on the contrary, alleges that in the record of the case of each said alien [232] upon which the Acting Secretary of Labor made his findings, there existed substantial evidence to support said warrant of deportation, as will appear from the following:

The said record in the case of said alien Bhagat Singh shows that when duly examined under the Immigration laws and rules at Angel Island, California, on August 1st, 1913, said alien claimed:

That he was twenty-two years old, and was born in India, which country he left three years before his said examination; that he first went to Hong Kong, and was there employed as a watchman at a salary of about \$10 gold a month, until a month and a half before his said examination, when he went to Manila (his certificate shows that he arrived at Manila May 18, 1913), because of his having heard of better prospects there; that he was again employed as watchman

at about \$20 gold a month in Manila; that upon hearing of still better prospects he came to the United States, where it was his purpose to engage in any work he could secure; that while he had \$150 gold at the time of his entry at Manila he had only fifty dollars gold at the time he arrived at San Francisco. The record in this case further shows that the alien had been arrested under a warrant issued on July 30, 1913, by the Acting Secretary of Labor charging him with being an alien who was likely to become a public charge at the time of his entry into the United States; and, in addition, as a circumstance, that he was an alien of the Hindoo race; that there existed in the United States, and particularly in the State of California, in which community affidavits filed on behalf of the alien stated that he could secure employment, a prejudice and antipathy against members of that race; and that the specific causes that had led up to and created the said prejudice and antipathy, wherefrom it [233] had been found that aliens of the said race when associated with circumstances with which this alien Bhagat Singh in his aforesaid claims alleged that he was surrounded, were likely to become public charges in the United States.

The said record in the case of said alien Sowan Singh shows that when duly examined under Immigration laws and rules at Angel Island, California, on August 1st, 1913, said alien claimed:

That he was twenty-five years old, married and born in India, where his wife was living; that he left his native land about a year before his said examination, going first to Hong Kong, where he was em-

ployed as a watchman at about seven and a half or eight dollars gold a month; that from Hong Kong he went Sinduca (?), in British North Borneo, from where he went to Segon (?), French Indo-China; that upon hearing that he could get better employment in Manila he went there about four and a half or five months before his said examination (his certificate shows that he arrived in the Philippine Islands March 11, 1913), while in the Philippine Islands he peddled cloth from door to door, making from fifteen to twenty-two dollars and fifty cents gold a month; that he was then informed that he could get still better employment, and could make a better income in the United States; that because of this he came here, intending to work as a farm laborer if he could not go into business for himself; that while he had from fifty to seventy-five dollars gold at the time of his entry at Manila, he had only fifty dollars gold at the time of his arrival at San Francisco; that he had some land, and from five hundred to one thousand rupes in his own country; that he had no documentary evidence to show that he possessed this money, alleging that most of it was buried and [234] not in any bank; that he knew nothing of any bond having been furnished in the Philippine Islands conditioned that he would not become a public charge. He produced no documentary or other evidence showing his ownership of, or interest in any land. The said record further shows that this alien was landed at Manila as aforesaid under a bond in the sum of two hundred and fifty dollars conditioned that he would not become a public charge

in the Philippine Islands; that on his arrival as aforesaid at San Francisco, he was examined by the United States Medical Examiner of aliens and found to be afflicted with ucinariasis (hookworm), a dangerous, contagious disease; that he was arrested under a warrant issued on July 30, 1913, by the Acting Secretary of Labor charging him with being an alien who was likely to become a public charge at the time of his entry into the United States; and, in addition, as a circumstance, that he was an alien of the Hindoo race; that there existed in the United States, and particularly in the State of California, in which community affidavits filed on behalf of the alien stated that he could secure employment, a prejudice and antipathy against members of that race; and that the specific causes that had led up to and created the said prejudice and antipathy, wherefrom it had been found that aliens of the said race when associated with circumstances with which this alien Sowon Singh in his aforesaid claims alleged that he was surrounded, were likely to become public charges in the United States.

That said record in the case of said alien Arjan Singh shows that when duly examined under the Immigration laws and rules at Angel Island, California, on July 31st, 1913, said alien claimed:

That he was twenty-five years old, married, and was born in India, where his wife lived; that he left [235] India, where his occupation was that of soldier, four or five months before his said examination, going to Hong Kong, where he stayed twenty days, and from which place he went to Manila (his

certificate showed that he arrived at Manila on June 9, 1913), where he lived one month, and where his occupation was that of peddler of clothes; that while in Manila he made about eight dollars and a half gold; that from Manila he came to the United States because he heard that this was a better country, and that there were no restrictions upon people entering it; that while he had about one hundred and fifty dollars gold when he entered at Manila, he had only about fifty dollars gold when he arrived at San Francisco; that he could do farming or any kind of work, but intended to engage in some work or business of his own; that he knew nothing of a bond being furnished at the time of his entry at Manila conditioned that he would not become a public charge. The said record further shows that he was admitted at Manila under a bond in the sum of two hundred and fifty dollars conditioned that he would not become a public charge in the Philippine Islands; and that upon his said arrival at San Francisco he was certified by the United States Medical Examiner of Aliens as being afflicted with arrhythmia (irregular heart action), affecting his ability to earn a living; that he was arrested under a warrant issued on July 30, 1913, by the Acting Secretary of Labor, charging him with being an alien who was likely to become a public charge at the time of his entry into the United States, and in addition, as a circumstance, that he was an alien of the Hindoo race; that there existed in the United States and particularly in the State of California, in which community affidavits filed on behalf of the alien stated that he could secure employment,

a prejudice and antipathy against members of that race; and that the specific causes that [236] had led up to, and created the said prejudice and antipathy, wherefrom it had been found that aliens of the said race when associated with circumstances with which this alien Arjan Singh in his aforesaid claims alleged that he was surrounded, were likely to become public charges in the United States.

The said record in the case of said alien, Partab Singh, shows that when duly examined under the Immigration laws and rules at Angel Island, California, on July 31st, 1913, said alien claimed:

That he was 33 years old, married, born in India where he had a wife and one child living; that in his own country he was a farmer, and owned land there; that from India he went to Shanghai, where he was connected with the police force; that from Shanghai he went to Nagasaki, where he stayed three days, doing nothing; that from Nagasaki he went to Manila, because he knew that Manila was a better place to go to for work or business (his certificate shows that he arrived in Manila, June 20, 1913); that he stayed in Manila fifteen days, where he followed the occupation of peddler, making twenty or twenty-five dollars gold there (when asked whether he intended to come to the United States at the time he went to Manila) that "I had no firm intention but I thought if I could go from Manila to the United States I might go"; that while he had about two hundred dollars gold when he entered Manila, he had only sixty-three dollars gold when he arrived at San Francisco; that he had four hundred or five hundred

dollars more in Shanghai, and in his own country; that he intended to engage in business in the United States, but would work for others if necessary; that his uncle's son, whose address he did not know, was [237] in Portland. No documentary or other evidence whatsoever was produced to substantiate the claim of this alien that he owned land or money in India, or Shanghai, or in any other place. The record in this case further shows that the alien had been arrested under a warrant issued on July 30, 1913, by the Acting Secretary of Labor charging him with being an alien who was likely to become a public charge at the time of his entry into the United States; and, in addition, as a circumstance, that he was an alien of the Hindoo race; that there existed in the United States, and particularly in the State of California, in which community affidavits filed on behalf of the alien stated that he could secure employment, a prejudice and antipathy against members of that race; and that the specific causes that had led up to and created the said prejudice and antipathy, wherefrom it had been found that aliens of the said race when associated with circumstances with which this alien Partab Singh in his aforesaid claims alleged that he was surrounded, were likely to become public charges in the United States.

The said record in the case of said alien, Asa Singh, shows that when duly examined under the Immigration laws and rules at Angel Island, California, on July 31st, 1913, said alien claimed:

That he was thirty years old, married, and was born in India where he had a wife and child living;

that he owned land in India, worth about one thousand dollars gold, and was a farmer there; that from there he went to Hong Kong, where he stayed three months, and where he was employed as a watchman for about six dollars gold a month; that from Hong Kong he went to Manila (his certificate shows that he arrived at Manila on May 30, 1913), where he stayed a month and a half, and where he was engaged in peddling clothes, making about twenty-five or [238] thirty dollars gold; that at the time of his leaving Hong Kong for Manila he intended to come to the mainland of the United States; that while he had about one hundred and fifty dollars gold when he arrived at Manila, he had only fifty dollars gold when he arrived at San Francisco; that he could raise from seven hundred and fifty to one thousand dollars gold in his native country; that he would be a farmer in the United States, or do any work that he could get; that he did not understand whether a bond was offered for his release at Manila, conditioned that he would not become a public charge. No documentary evidence or evidence of any kind was produced to corroborate the claim of this alien that he owned land or money, other than the fifty dollars gold that he brought with him, in India or elsewhere. The record in this case further shows that the alien had been arrested under a warrant issued on June 30, 1913, by the Acting Secretary of Labor, charging him with being an alien who was likely to become a public charge at the time of his entry into the United States; that he was admitted at Manila under a bond in the sum of two hundred and fifty dollars condi-

tioned that he would not become a public charge; that upon his arrival at San Francisco he was found by the United States Medical Examiner of aliens to be afflicted with ucinariasis (hookworm), a dangerous, contagious disease; and in addition as a circumstance, that he was an alien of the Hindoo race; that there existed in the United States, and particularly in the State of California, in which community affidavits filed on behalf of the alien stated that he could secure employment, a prejudice and antipathy against members of that race; and that the specific causes that had led up to and created the said prejudice and antipathy, wherefrom it had been found that aliens of the said race when [239] associated with circumstances with which this alien Asa Singh in his aforesaid claims alleged that he was surrounded, were likely to become public charges in the United States.

The said record in the case of said Sapuran Singh shows that when duly examined under the Immigration laws and rules at Angel Island, California, on July 31st, 1913, said alien claimed:

That he was twenty-two years old, born in India, where he had been employed in farming on his father's land; that he left his native country about six years before his said examination, going to Hong Kong, where he was employed at a salary of about nine dollars gold a month as a night watchman in an officers' club; that from Hong Kong he went to Nagasaki, where "there was nothing doing"; that therefrom he went to Manila (his certificate shows that he arrived at Manila on May 30, 1913), where

he had heard opportunities were better, and where he stayed about a month, following the occupation of peddler, and making about thirty dollars gold; that when he went to Manila it was his intention to become a merchant there; that five or ten days after arriving at Manila he inquired about coming to the United States, and came to the United States because he was told that prospects there were better than in Manila; that he had about sixty-six dollars gold when he landed at Hong Kong (which was six years before), one hundred and twenty-five dollars gold when he landed at Manila, and fifty dollars gold when he arrived at San Francisco; that while in the United States he intended to be a peddler of clothes or a farmer; that he was not coming to join anyone in the United States. The record in the case of this alien further shows that he had been arrested on July 30, 1913, by the Acting Secretary of Labor [240] charging him with being an alien who was likely to become a public charge at the time of his entry into the United States; and, in addition, as a circumstance, that he was an alien of the Hindoo race; that there existed in the United States, and particularly in the State of California, in which community affidavits filed on behalf of the alien stated that he could secure employment, a prejudice and antipathy against members of that race; and that the specific causes that had led up to and created the said prejudice and antipathy, wherefrom it had been found that aliens of the said race when associated with circumstances with which this alien Sapuran Singh in his aforesaid claims alleged that he was sur-

rounded were likely to become public charges in the United States.

The said record in the case of said Soba Singh shows that when duly examined under the Immigration laws and rules at Angel Island, California, on July 31, 1913, the said alien claimed:

That he was twenty-three years old, married, born in India, where he had a wife and one child; that he left his native country about two years before his said examination, going to Shanghai, where he stayed two years, being employed there as a watchman at about ten dollars gold a month; that from Shanghai he went to Manila (his certificate shows that he arrived at Manila on May 30, 1913), where he stayed one month and three days, and where he was engaged for three weeks in peddling clothes, making thereby about thirty dollars gold; that while in Manila, being in American territory, and thinking that he would like to see this country, he thought that he might just as well come here, since he heard that conditions were better here than in the Philippine Islands; that while he had [241] about one hundred dollars gold when he entered Manila, he had only about fifty dollars gold on his arrival at San Francisco; that while in this country he would do agricultural or any kind of work that he could get. The record in this case further shows that the alien had been arrested under a warrant issued on July 30, 1913, by the Acting Secretary of Labor, charging him with being an alien who was likely to become a public charge at the time of his entry into the United States; and, in addition, as a circum-

stance, that he was an alien of the Hindoo race; that there existed in the United States, and particularly in the State of California, in which community affidavits filed on behalf of the alien stated that he could secure employment, a prejudice and antipathy against members of that race; and that the specific causes that had led up to and created the said prejudice and antipathy, wherefrom it had been found that aliens of the said race when associated with circumstances with which this alien Soba Singh in his aforesaid claims alleged that he was surrounded, were likely to become public charges in the United States.

The said record in the case of said alien, Sham Singh, shows that when duly examined under the Immigration laws and rules at Angel Island, California, on August 1st, 1913, said alien claimed:

That he was thirty-five years old, a widower, born in India, where he had one child living; that he left his native land about two years before his said examination, first going to Hong Kong, then to Gooton, China, then to Nagasaki, and then to Manila, where he arrived about the preceding March (his certificate shows that he arrived at Manila, April 4, 1913); that in India he was a farmer on his own land; that in Hong Kong he was employed as a watchman at about nine dollars gold a month; that in [242] Nagasaki, where he did nothing, he stayed a month; that his object in going to Manila was to "do some business"; that in Manila he was a peddler of Japanese silk goods and handkerchiefs, having no shop, and making an average of fifteen to twenty dollars

gold a month; that he did not bother to look for employment in Manila; that in Manila he was informed that the United States was a good country and so came here to "try his luck"; that he had about one hundred and fifty dollars gold when he arrived at Manila, but had only about fifty dollars gold on his arrival at San Francisco; that in the United States he might do farming or "any other business"; that he had more money at home, and could get one thousand dollars in the currency of his own country if he wanted it. No documentary evidence was produced to show that he had land or money other than the fifty dollars he brought with him, in India or elsewhere. The record in this case further shows that the alien had been arrested under a warrant issued on July 30, 1913, by the Acting Secretary of Labor charging him with being an alien who was likely to become a public charge at the time of his entry into the United States; and, in addition, as a circumstance, that he was an alien of the Hindoo race; that there existed in the United States, and particularly in the State of California, in which community affidavits filed on behalf of the alien stated that he could secure employment, a prejudice and antipathy against members of that race; and that the specific causes that had led up to and created the said prejudice and antipathy, wherefrom it had been found that aliens of the said race when associated with circumstances with which this alien Sham Singh in his aforesaid claims alleged that he was surrounded were likely to become public charges in the United States. [243]

The said record in the case of said alien, Viryan Singh, shows that when duly examined under the Immigration laws and rules at Angel Island, California, on August 1st, 1913, said alien claimed:

That he was thirty-six years old, married, and was born in India, where his wife was living; that he left India six years before his said examination, going to Shanghai, and then to Manila, eight months before his said examination (his certificate shows that he arrived at Manila on October 22, 1912); that in Shanghai he was employed as a watchman for ten dollars gold a month; that in Manila he was also employed as a watchman at twenty dollars gold a month; that he came to San Francisco because he had learned that this was a better country than the Philippine Islands; that he had about one hundred dollars gold when he arrived at Manila; that while in the United States he preferred to do farming, or to conduct an independent business, but would accept any occupation he could secure if necessary; and when he entered the Philippine Islands at Manila he gave some Englishman about thirty dollars gold but did not know what it was for. The record in this case further shows that the alien had been arrested under a warrant issued on July 30, 1913, by the Acting Secretary of Labor, charging him with being an alien who was likely to become a public charge at the time of his entry into the United States; that at the time of his landing at Manila there was furnished for him a bond in the sum of two hundred and fifty dollars that he would not become a public charge; and, in addition, as a circum-

stance, that he was an alien of the Hindoo race; that there existed in the United States, and particularly in the State of California, in which community affidavits [244] filed on behalf of the alien stated that he could secure employment, a prejudice and antipathy against members of that race; and that the specific causes that had led up to and created the said prejudice and antipathy, wherefrom it had been found that aliens of the said race, when associated with circumstances with which this alien Viryan Singh in his aforesaid claims alleged that he was surrounded, were likely to become public charges in the United States.

The record in the case of said alien, Sohn Singh, shows that when duly examined under the Immigration laws and rules at Angel Island, California, on August 1st, 1913, said alien claimed:

That he was twenty-five years old, and born in India, which country he left about three years before his said examination; that in India he had been a farmer and owned land; that from India he first went to Shanghai, where he lived for three years, then going to Manila, where he lived fifteen days, before embarking for the United States (his certificate shows that he arrived at Manila on June 20, 1913); that in Shanghai he was a watchman for a Chinese firm; receiving about ten dollars a month; that before going to Manila he had heard that if he went there he could gain entrance to this country easier; that as a matter of fact he intended to come to the United States (this country) at the time he went to Manila; that while he had about one hun-

dred and seventy-five dollars gold when he entered Manila, he had only fifty dollars gold when he arrived at San Francisco; that he intended to "do some business" when he went to Manila; that he tried to get work there, but could not; that he intended to do farm work in the United States; that he had no relatives in [245] this country; that he had about fifty dollars gold in Shanghai, that he was not aware that a bond was given for him at Manila conditioned that he would not become a public charge, although "they told me these things." No documentary or other evidence was produced to corroborate alien's statement that he had any money except the fifty dollars he brought with him, in Shanghai or elsewhere, or that any further sum was available to him. The record in this case further shows that this alien was landed at Manila as aforesaid under a bond in the sum of two hundred and fifty dollars conditioned that he would not become a public charge in the Philippine Islands; that on his arrival as aforesaid at San Francisco, he was examined by the United States Medical Examiner of aliens and found to be afflicted with ucinariasis (hookworm), a dangerous contagious disease; that he was arrested under a warrant issued on July 30th, 1913, by the Acting Secretary of Labor charging him with being an alien who was likely to become a public charge at the time of his entry into the United States; and, in addition, as a circumstance, that he was an alien of the Hindoo race; that there existed in the United States, and particularly in the State of California, in which community affidavits filed on be-

half of the alien stated that he could secure employment, a prejudice and antipathy against members of that race; and that the specific causes that had led up to and created the said prejudice and antipathy, wherefrom it had been found that aliens of the said race when associated with circumstances with which this alien Sohn Singh in his aforesaid claims alleged that he was surrounded, were likely to become public charges in the United States.

The said record in the case of said alien, Naron Singh, shows that when duly examined under the Immigration [246] laws and rules at Angel Island, California, on July 31, 1913, said alien claimed:

That he was thirty-two years old, married, and born in India where his wife was living; that he left India four years before his said examination, going first to Shanghai, where he lived for four years, then to Nagasaki, where he stayed twelve days, and then to Manila, where he stayed about two weeks before embarking for this country (his certificate shows that he arrived at Manila on June 20, 1913); that at Shanghai he was employed as a watchman for about eleven dollars gold a month; that at Manila he sought employment, but could not get it, and was just about to start a business when he heard good accounts of the United States, and made up his mind to come here; that while he had about two hundred dollars gold at the time he arrived at Manila, he had only fifty dollars gold when he arrived at San Francisco; that he had about one hundred dollars gold in his own country. No documentary evidence

was produced to show that he had any money other than the fifty dollars gold that he brought with him or that any other money was available to him. The record in this case further shows that the alien had been arrested under a warrant issued on July 30, 1913, by the Acting Secretary of Labor charging him with being an alien who was likely to become a public charge at the time of his entry into the United States; and, in addition, as a circumstance, that he was an alien of the Hindoo race; that there existed in the United States, and particularly in the State of California, in which community affidavits filed on behalf of the alien stated that he could secure employment, a prejudice and antipathy against members of that race; and that the specific causes that had led up to [247] and created the said prejudice and antipathy, wherefrom it had been found that aliens of the said race when associated with circumstances with which this alien, Naron Singh, in his aforesaid claims alleged that he was surrounded, were likely to become public charges in the United States.

The said record in the case of said alien, Gulam Nabi, shows that when duly examined under the Immigration laws and rules at Angel Island, California, on July 31st, 1913, said alien claimed:

That he was twenty-seven years old, married, and was born in India, where his wife and his one child were living; that he left India five months before his said examination, going first to Hong Kong, then to Nagasaki, and then to Manila where he arrived about a month before (his certificate shows that he

arrived at Manila on June 29th, 1913); that he stopped in Manila only about two or three days; that he had been in the United States before, having come here about seven years ago via Vancouver and having departed from the United States for India a little over two years ago; that it was his intention to resume his occupation as a teamster and laborer at a lumber mill at Aberdeen, Washington; that he had no property in the United States; that he had been farming on his father's land while last in India; that he had tried at Hong Kong to buy a ticket direct to the United States, but was told that he would have to go to Manila before he could secure a ticket for the United States; that he went to Manila with the intention of coming here from there; that he had only forty dollars gold at the time of his said examination. The record in this case further shows that the alien had been arrested under a warrant issued on July 30, 1913, by the Acting Secretary of Labor charging him with being an [248] alien who was likely to become a public charge at the time of his entry into the United States; and, in addition, as a circumstance, that he was an alien of the Hindoo race; that there existed in the United States, and particularly in the State of California, in which community affidavits filed on behalf of the alien stated that he could secure employment, a prejudice and antipathy against members of that race; and that the specific causes that had led up to and created the said prejudice and antipathy, wherefrom it had been found that aliens of the said race when associated with circumstances with which this alien, Gulam

Nabi, in his aforesaid claims alleged that he was surrounded, were likely to become public charges in the United States.

1. As to subdivision 1 of paragraph 8 of the petition, respondent admits all allegations contained therein, except that the warrant of deportation referred to was issued on July 29, 1913, and that it was charged, among other things, in the application referred to for warrant of arrest for said aliens Bhagat Singh, Sowam Singh, Arjan Singh, Partab Singh, Asa Singh, Sapuran Singh, Soba Singh, Viryan Singh, Sohn Singh, Naron Singh, and Gulam Nabi, "That there is a strong prejudice against them"; but, on the contrary, respondent alleges that said warrant of deportation was issued on October 10, 1913, and that said application for warrant for arrest of each of said aliens contained the statement "There exists a strong prejudice against them *in this locality*," and not as alleged in the petition as aforesaid, "That there is a strong prejudice against them."

2. As to subdivision 2 of paragraph 8 of the petition, respondent admits the allegations contained therein, except that respondent denies that in his examination referred to any of said aliens answered to the [249] best of his ability all of the questions that were propounded to him by Inspector R. E. Peabody.

3. As to subdivision 3 of paragraph 8 of the petition, respondent admits that neither said Bhagat Singh, Sowam Singh, Arjan Singh, Partab Singh, Asa Singh, Sapuran Singh, Soba Singh, Sham Singh,

Viryan Singh, Sohn Singh, Naron Singh, or Gulam Nabi, was informed of the charges or allegations made against him, or of the issuance of the warrant for his arrest, until the conclusion of his examination; but respondent alleges that this was, in the case of each of said aliens, in accordance with rule 22, subdivision 4 of the Immigration rules, which provides that the alien shall be allowed to inspect the warrant of arrest and all evidence on which it is issued during the course of the hearing.

4. As to subdivision 4 of paragraph 8 of the petition, respondent admits the allegations contained therein, and further alleges that each of said aliens was examined separately and without reference to the cases of the other said aliens, or to the case of any of the other said aliens, and that all such evidence as was at any time offered in the case of each or any of the said aliens, or in the cases of all of the said aliens, was taken and received, and that full opportunity was given each, any and all said aliens, and his and their attorneys, to offer or submit any evidence he or they desired.

5. As to subdivision 5 of paragraph 8 of the petition, respondent admits the allegations contained therein, and further alleges that the affidavits referred to were filed in behalf of the said aliens collectively; and that said affidavits were in effect declarations concerning Hindoos generally as a people or race, and did not refer to the said aliens in whose behalf this petition was filed individually, but treated them generally as [250] members of the Hindoo people or race.

6. As to subdivision 6 of paragraph 8 of the petition, respondent admits the allegations contained therein, except (1) that respondent said at the time or stage of the proceedings in the cases referred to in the petition that "the case would be at once sent to the Secretary of Labor for decision and judgment, and that no further evidence and no further hearing or testimony would be introduced, held or heard on one side or the other"; and (2) that at the said time or stage of the proceedings in the cases there was no evidence to support the charges that these aliens would ever become public charges, or that they were or ever would be likely to become public charges. These allegations respondent denies, and as to (2) alleges that there was substantial evidence that each such alien was a person likely to become a public charge at the time of his entry into the United States, as charged in the said warrant of arrest.

7. As to subdivision 7 of paragraph 8 of the petition, respondent denies the allegations contained therein.

8. As to subdivision 8 of paragraph 8 of the petition, respondent denies the allegations contained therein, except (1) that certain affidavits, interviews, and letters were placed in the records of the cases of said aliens by the Government, and (2) that no opportunity was given any of the said aliens or their attorneys to cross-examine the persons who made the affidavits, gave the interviews, or wrote the letters referred to. Respondent alleged (1) that these affidavits, interviews and letters were introduced in the records of the cases of the said aliens by the Govern-

ment because of the previous introduction therein by the said aliens of the affidavits referred to in subdivision 5 of paragraph 8 of the [251] petition, and referred to in subdivision 5, paragraph V of this Return, and for the purpose of *rebutting* the general and circumstantial allegations contained in the last mentioned affidavits with evidence of a like general circumstantial nature; and respondent further alleges (2) that no opportunity contemplated by the Immigration laws and rules to cross-examine any persons was denied any of the said aliens or their attorneys.

9. As to subdivision 9 of paragraph 8 of the petition, respondent admits that after introducing into the records of the said aliens the before mentioned affidavits, interviews and letters, the respondent invited a counter-showing and additional brief on behalf of any or all of said aliens, but denies that said aliens and their attorneys "filed for record a respectful, but earnest protest against the procedure adopted by the Department of Labor in reopening of the record"; but, on the contrary, respondent alleges, that on receipt of respondent's letter dated September 25th, 1913, notifying one of the said alien's attorneys that additional evidence—meaning the said affidavits, interviews, letters, and the newspaper clippings to be referred to hereafter—had been added to the records in the cases of the said aliens by the Government, and that said attorney was entitled to inspect and copy the same as well as to pursue such action in view of the same as he deemed proper in behalf of his clients, the said attorney replied to the said letter of respondent by a letter dated Septem-

ber 27, 1913, thanking respondent for the courtesy of informing him that he would be permitted to inspect the additional evidence, and offer further evidence, but making no complaint or protest whatsoever to the introduction in the record by the Government of the said additional evidence. Respondent further alleges [252] that it was not until some time thereafter, and then only in the final brief submitted by the attorneys in behalf of said aliens, that any protest was made to the introduction of said additional evidence by the Government; and respondent further alleges that accompanying said brief were further affidavits offered in behalf of the said aliens, circumstantial in their nature in that the declarations contained in them referred to Hindoos generally as a people or race, and not to the said aliens Bhagat Singh, Sowam Singh, Arjan Singh, Partab Singh, Asa Singh, Sapuran Singh, Soba Singh, Sham Singh, Viryan Singh, Sohn Singh, Naron Singh and Gulam Nabi individually, which said affidavits were accepted and placed in the records of the cases of the said aliens and submitted to the Department of Labor for consideration and decision.

10. As to subdivision 10 of paragraph 8 of the petition, respondent admits that in forwarding the said records of the cases of the said aliens to the Department of Labor for consideration and decision, he wrote a letter addressed to the Commissioner-General of Immigration, Washington, D. C., in which was expressed his views upon the cases of said aliens, which said letter was, under the practice that obtains in such cases in the Department of Labor, considered

a confidential communication, not subject to inspection by aliens or their attorneys. Respondent further admits that as a part of the said records transmitted to the Department of Labor were a large number of newspaper clippings relative to Hindoos, but states that said newspaper clippings were filed merely as a rebuttal of the aforesaid affidavits filed in behalf of the said aliens. Respondent has in his possession said letter and newspaper clippings and stands ready to produce them should their production be desired.

VI.

As to paragraphs 9, 10 and 11 of the petition, [253] respondent denies the allegations contained therein.

VII.

As to paragraph 12 of the petition, respondent admits that he stands ready under said warrant of deportation to deport each of the said aliens should he be permitted to do so by this Honorable Court; but respondent denies that any or all of the said aliens have exhausted all their rights and remedies before the Department of Labor, in that none of them have ever applied for a reopening or a reconsideration of their cases by the said Department.

WHEREFORE, your respondent prays that a writ of *habeas corpus* do not issue herein, that the

Order to Show Cause be discharged, and that the petition be dismissed.

BENJ. L. McKINLEY,
United States Attorney,
Attorney for Respondent.

WALTER E. HETTMAN,
Assistant U. S. Attorney,
Of Counsel. [254]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Charles D. Mayer, being first duly sworn, deposes and says:

That he is an Immigrant Inspector connected with the Immigration Service for the port of San Francisco, and has been specially directed to appear for, and represent the respondent, Samuel W. Backus, Commissioner of Immigration, in the within entitled matter; that he is familiar with all the facts set forth in the within Return to Order to Show Cause, and knows the contents thereof; that it is impossible for the said Samuel W. Backus to appear in person or to give his attention to said matter; that of affiant's own knowledge, the matters set forth in the Return to Order to Show Cause are true, excepting those matters which are stated on information and belief and that as to those matters, he believes it to be true.

CHARLES D. MAYER.

Subscribed and sworn to before me this 28th day of November, 1913.

[Seal] FRANCIS KRULL,
United States Commissioner, North'n Dist. of California.

Service of the within amended return by copy admitted this first day of December, 1913.

JOHN L. McNAB,
TIMOTHY HEALY,
Attorneys for Petitioner.

[Endorsed]: Filed Dec. 1, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [255]

(Style of Court, Title, and Number of Cause.)

Return [to Order to Show Cause in Case No. 15,480].

Now comes Samuel W. Backus, Commissioner of Immigration at the Port of San Francisco, by Charles D. Mayer, Immigrant Inspector, and in return to the Order to Show Cause issued by said Court on the petition of Timothy Healy for a writ of *habeas corpus*, respectfully shows that your respondent holds SUNDAR SINGH, NARON SINGH, BISHAN or BISHEN SINGH, FOMAN SINGH, JAGAT or JAGOT SINGH, JAMIT or JAWAT SINGH, MADA RAM or MADO PAN, FERROZ KHAN, MAHBUB or MAHBUT ALI, ADBOOLAH or ABDULLA KHAN under an order of deportation signed and issued by the Honorable Secretary of Labor and dated the 10th day of October, 1913.

I.

Respondent admits each and every allegation contained in paragraphs 1, 2, 3 and 4 of the Petition, except that in paragraph 4 of the Petition respondent denies that the alien Hindoos were *bona fide* residents of the United States, or that they are lawfully

in the United States. [256]

II.

Respondent admits each and every allegation contained in paragraphs 5, 6 and 7 of the Petition, except that in paragraph 7 thereof, respondent denies that the alien Hindoos are unlawfully imprisoned, detained, confined and restrained of their liberty.

III.

Respondent admits each and every allegation contained in the introductory statement of paragraph 8 of the Petition.

Respondent admits each and every allegation of subdivisions 1 and 2 of paragraph 8 of the Petition, but denies that the Hindoos did answer fully and to the best of their ability the questions put to them at the examination before Immigrant Inspector R. E. Peabody on July 30, 1913.

Respondent admits each and every allegation of subdivision 3 of paragraph 8 of Petition, but alleges further that such action was in accordance with rule 22, subdivision 4, of the Immigration Regulations, which provides that the applicant need not be informed of the charges against him until the end of the preliminary hearing.

Respondent denies each and every allegation of subdivision 4 of paragraph 8 of the Petition.

Respondent admits each and every allegation in subdivision 5 of paragraph 8 of the Petition, but alleges further that with the exception of the affidavit of I. L. Borden and two others, all of the affidavits put in evidence by petitioner were made by Hindoos. Respondent alleges further that affidavits of State

and county officials throughout the State of California were made opposing the admission of Hindoos into the United States. The names and respective offices of some of such affiants are as follows: [257]

Paul Sharrenberg, Secretary Treasurer California State Federation of Labor.

John P. McLaughlin, Commissioner of Labor for the State of California.

F. E. Sullivan, General Manager Spreckels Sugar Co.

H. E. Davis, Under-sheriff Monterey Co., Cal.

T. J. Vitaich, Business Agent, San Joaquin County Central Labor Council.

Frank B. Braire, Chief of Police, Stockton, Cal.

Wm. Johnson, Chief of Police, Sacramento, Cal.

Eugene S. Wachhorst, District Attorney, Sacramento, Cal.

George E. Gee, Secretary Yuba County Trades Council.

J. P. Onstott, Farmer, Yuba City, Cal.

Charles J. McCoy, Chief of Police, Marysville, Cal.

P. Brannan, Special Officer, Marysville, Cal.

Harry E. Hyde, Mayor, Marysville, Cal.

J. V. Parks, Justice of the Peace, Oroville, Cal.

Wm. Lewis Kurran, Marshal, Oroville, Cal.

James J. Wood, Theatre Manager, Chico, Cal.

C. E. Daly, Merchant, Chico, Cal.

H. Moir, Postmaster, Chico, Cal.

F. J. Nottelmann, Merchant, Chico, Cal.

J. N. Kelly, Merchant, Chico, Cal.

M. G. Polk, County Surveyor, Butte Co., Cal.

Lon Bond, Attorney, Chico, Cal.

J. L. Barnes, Justice of the Peace, Chico, Cal.

M. H. Goe, Marshal, Chico, Cal.

Wm. Robbie, Mayor, Chico, Cal.

E. C. Hamilton, Manager Sacramento Valley Sugar Co.

Geo. A. Dean, Secy. San Joaquin County Central Labor Council.

H. Hamer, Immigrant Inspector, Bellingham, Wash.

[258]

The consensus of opinion as set forth by these affidavits which are appended to the Petition as exhibits is to the effect that the Hindoo is an undesirable citizen; that he is filthy, unsanitary, immoral, gives the officials continuous trouble by becoming intoxicated and subject to arrest; that he is a disagreeable member of every community because of his uncleanness and offensive order; that he becomes a public nuisance in crowding the sidewalks, street corners, postoffices and other public buildings; that merchants, theatrical managers and business men generally exclude him from their places of business; that the Hindoo is unreliable; that he is a petty thief, nomadic in his habits, will not remain employed in any particular work unless under a strict contract; that his standard of living is of the very lowest and that he does not rear families or permanently establish himself in the country in which he works; that he is a degenerate physically, and generally in a weak and enervated condition, and invariably afflicted with the disease of hookworm; that the Hindoo belongs to the laboring class; that demand for Hindoo labor is very limited, and if desired at all is only

for transient periods, and because of the strong prejudice against him, and the fact that he is continually a public nuisance and a burden to all society, it is deemed by all the affiants above named that he is likely to become a public charge, and that he should be expelled from the country.

Respondent denies each and every allegation in subdivisions 6 and 7 of paragraph 8 of the Petition.

Respondent admits each and every allegation of subdivision 8 of paragraph 8 of the Petition, with the exception that he denies that the affidavits are merely an expression of passion [259] and prejudice culled from persons in various parts of the State of California, but that the affidavits were *bona fide* expressions of opinion of white merchants and officials in possession of experience and influence, and having come in direct contact with Hindoo laborers.

Respondent admits each and every allegation in subdivision 9 of paragraph 8 of the Petition, and especially admits that the petitioner was allowed to file further evidence in the hearing before the Commissioner of Immigration, but respondent denies that any protest was made to such reopening of the case, except in a final brief filed by said petitioner and that in a letter signed by one of the attorneys for petitioner, dated September 27th, 1913, directed to Samuel W. Backus, Commissioner of Immigration at Angel Island, California, the statement was made that the attorneys for the petitioner acquiesced in the reopening of the case for further admission of evidence, and thanked the Commissioner for the courtesy in doing so.

IV.

Respondent denies each and every allegation set forth in paragraph 9 of the Petition, and especially denies that any competent evidence was submitted to the Commissioner of Immigration that the said Hindoos were likely to become public charges.

Respondent admits each and every allegation in subdivision 2 of paragraph 8 of the Petition, with the exception that he denies that the affidavits filed on behalf of respondent were prejudiced, and further denies that the reopening of the case and the record was protested by the attorneys for the alien Hindoos.

V.

Respondent denies each and every allegation set forth in paragraph 10 of the Petition. [260]

VI.

Respondent denies each and every allegation set forth in paragraph 11 of the Petition.

VII.

Respondent admits each and every allegation set forth in paragraph 12 of said Petition.

WHEREFORE, your respondent prays that a writ of *habeas corpus* do not issue herein, that the Order to Show Cause be discharged, and that the Petition be dismissed.

BENJ. L. McKINLEY,
United States Attorney,
Attorney for Respondent.

WALTER E. HETTMAN,
Assistant U. S. Attorney,
Of Counsel. [261]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Charles D. Mayer, being first duly sworn, deposes and says:

That he is an Immigrant Inspector connected with the Immigration Service for the port of San Francisco, and has been specially directed to appear for, and represent the respondent, Samuel W. Backus, Commissioner of Immigration, in the within entitled matter; that he is familiar with all the facts set forth in the within Return to Order to Show Cause, and knows the contents thereof; that it is impossible for the said Samuel W. Backus to appear in person or to give his attention to said matter; that of affiant's own knowledge, the matters set forth in the Return to Order to Show Cause are true, excepting those matters which are stated on information and belief, and that as to those matters, he believes it to be true.

CHARLES D. MAYER.

Subscribed and sworn to before me this 13th day of November, 1913.

[Seal] FRANCIS KRULL,
Deputy Clerk U. S. District Court, Northern District
of California.

Service of the within Return by copy admitted this 14 day of Nov., 1913.

J. L. McNAB,
Attorney for Petitioner.

[Endorsed]: Filed Nov. 14, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [262]

(Style of Court, Title and Number of Cause.)

Amended Return [to Order to Show Cause in Case No. 15,480].

Now comes Samuel W. Backus, Commissioner of Immigration at the Port of San Francisco, by Charles D. Mayer, Immigrant Inspector, and in return to the Order to Show Cause issued by said Court on the petition of Timothy Healy for a writ of *habeas corpus*, respectfully shows that your respondent holds SUNDAR or SUNDU SINGH, NARON SINGH, BISHAN or BISHEN SINGH, FOMAN SINGH, JAGAT or JAGOT SINGH, JAMIT or JAWAT SINGH, MADA RAM or MADO PAN, FERROZ KHAN, MAHBUB or MAHBUT ALI, ABDOOLAH or ADBULLA KAHN, all of whom are aliens under orders of deportation signed and issued by the Honorable Acting Secretary of Labor, dated October 10th, 1913, after a due and proper consideration of the record in the case of each of said aliens by the said Acting Secretary of Labor. [263]

I.

As to paragraph 3 of the Petition, respondent denies that said SUNDAR or SUNDU SINGH and said nine other aliens are *bona fide* domiciled residents, inhabitants and denizens of the United States of America; admits that they were born in India and are subjects of Great Britain; admits that they came from the Republic of China to an insular pos-

session of the United States, namely, the Philippine Islands, and were admitted thereto at the Port of Manila, but denies that they were admitted after due inspection by Immigration Officers and thereupon became and ever since have been and now are lawfully in the United States of America; admits that upon their arrival at Manila they paid the head tax required by the Immigration Laws and Rules.

II.

As to paragraph 5 of the Petition, respondent admits that said SUNDAR or SUNDU SINGH and the said nine other aliens signified to the Insular Collector of Customs at Manila an intention to go to the continent, and were furnished with certificates (Form 546-P. I.) as evidence of their entry at an insular port.

III.

As to paragraph 6 of the Petition, respondent admits that said SUNDAR or SUNDU SINGH and the said nine other aliens sailed from the port of Manila as passengers on the steamship "Korea" to the Port of San Francisco, but denies that any of said aliens had ever acquired a residence or a domicile in any part of the territory of the United States that they could have taken up or continued as denizens of the United States, by said sailing from the [264] Port of Manila to the Port of San Francisco.

IV.

As to paragraph 7 of the Petition, respondent denies that the said SUNDAR or SUNDU SINGH or any of the said nine other aliens were unlawfully imprisoned, detained, confined, or restrained of their

liberty by respondent; admits that they were about to be deported to India from the United States, and from the State of California, when the said petition was filed; denies that such contemplated deportation would have been from their domicile and would have deprived any of them of a lawful residence, or of any privilege of immunity whatsoever.

V.

As to paragraph 8 of the Petition, respondent admits that said SUNDAR or SUNDU SINGH and said nine other aliens were taken into custody on August 2d, 1913, by respondent, that the warrant of deportation referred to was issued by the Acting Secretary of Labor, and that he claims the right to hold in custody and to deport said SUNDAR or SUNDU SINGH and each of said nine other aliens under and by virtue of the said warrant of deportation.

Respondent denies that said SUNDAR or SUNDU SINGH or any of said nine other aliens were, prior to the issuance of said warrant of deportation, or have been at any time, refused or denied a fair hearing in good faith, such as is guaranteed them by the law, by respondent or said Acting Secretary of Labor.

Respondent denies that said warrant of deportation was issued by the Secretary of Labor by and through a manifest abuse of discretion committed by him by law and through errors and mistakes of law, but, on the contrary [265] alleges that in the record of the case of each said alien upon which the Acting Secretary of Labor made his findings, there existed substantial evidence to support said warrant

of deportation, as will appear from the following:

1. The said record in the case of said alien SUNDAR or SUNDU SINGH shows that when duly examined under the Immigration laws and rules at Angel Island, California, on August 5, 1913, the said alien claimed:

That he was 31 years old, born in India, which country he left over four years before his said examination, when he first went to Shanghai, where he stayed about four years, and then went to Manila (his certificate showed that he arrived at Manila June 20, 1913), where he stayed 17 days before coming to San Francisco, that he was employed for four years as a policeman in the British Consulate at Shanghai, receiving for his services about \$12.50 gold a month; that for a short time after quitting his said position as policeman, he conducted a store in Shanghai, in which he invested \$300 gold; that he went to Manila because he thought he could do better there by opening a shop; that he stayed in Manila only 17 days during which time he looked for a business opening, but found too much competition, and so decided to come to this country, having heard that America was a very good place; that he intended to look for a business opening in this country, but if he should not find one he would perform any kind of work; that he had \$300 gold when he arrived at Manila, and had only \$163 gold when he arrived at San Francisco. This alien presented at his said examination a passport issued by the British Consulate at Manila on July 3, 1913; and also presented a certificate of a doctor, without date (not a physician of

the United States Government), to the effect that said doctor had microscopically [266] examined the face of one Sundar Singh, age 31, sailing on the S.S. "Korea" voyage 52 from Hongkong, and did not find any ova of hookworm present. The voyage in this case further shows that upon the arrival of said alien at the port of San Francisco as aforesaid he was examined by the United States Medical Examiner of Aliens and found to be afflicted with uncinariases (hookworm), a dangerous contagious disease; that said alien had been arrested under a warrant issued on October 5, 1913, by the Acting Secretary of Labor, charging him with being a member of the excluded classes in that he was a person likely to become a public charge at the time of his entry in the United States; and in addition, as a circumstance, said record further shows that said Sundar Singh was an alien of the Hindoo race; that there existed in the United States, and particularly in the State of California, in which community affidavits filed on behalf of said alien stated that he could secure employment, a prejudice and antipathy against members of that race; and that the specific causes that had led up to and created the said prejudice and antipathy, wherefrom it had been found that aliens of the said race when associated with circumstances with which the alien Sundar Singh in his aforesaid claims alleged that he was surrounded, were likely to become public charges in the United States.

2. The said record in the case of said alien Naron Singh shows that when duly examined under the Immigration laws and rules at Angel Island,

California, on August 5, 1913, the said alien claimed:

That he was 27 years old, married, born in India where his wife lived; that in his native country he was a farmer on his own land; that he left India about three years before his said examination, going first to Shanghai, and then to Manila; that in Shanghai he was a watchman at [267] a hotel at about \$11.50 gold a month; that he went to Manila on June 20, 1912 (his certificate showed that he arrived at Manila on that date); that he was unemployed while in Manila, but was offered a position as night watchman there, which position was very "troublesome" and which he therefore refused to accept; that he first heard about the United States in Manila; that while he had \$165 gold when he arrived in Manila, he had only \$50 gold at the time of his said examination; that he had \$50 gold in Shanghai, but had no evidence to substantiate his statement. Not only did this alien fail to produce any evidence whatsoever in corroboration of his claim that he had \$50 in Shanghai, but he produced no documentary or other evidence of his alleged ownership of land in India. The record in this case further shows that the said alien had been arrested under a warrant issued on October 5, 1913, by the Acting Secretary of Labor, charging him with being a member of the excluded classes in that he was a person likely to become a public charge at the time of his entry in the United States; and, in addition, as a circumstance, said record further shows that said Naron Singh was an alien of the Hindoo race; that there existed in the United States, and particularly in the State of Cali-

fornia, in which community affidavits filed on behalf of said alien stated that he could secure employment, a prejudice and antipathy against members of that race; and that the specific causes that had led up to and created the said prejudice and antipathy, wherefrom it had been found that aliens of the said race when associated with circumstances with which this alien Naron Singh in his aforesaid claims alleged that he was surrounded, were likely to become public charges in the United States. [268]

3. The said record in the case of said alien Bishan Singh shows that when duly examined under the Immigration laws and rules at Angel Island, California, on August 5, 1913, the said alien claimed:

That he was 27 years old, married, and was born in India, where his wife lived; that he was a farmer and then a soldier while in India; that from India he went to Shanghai, where he was employed in the police department for five years, receiving a salary of about \$12.50 gold a month; that he had heard that prospects for better employment were very good in Manila, and therefore went there on June 20, 1913 (his certificate showed that he arrived in Manila on June 20, 1913); that he started to peddle cloth in Manila and was making about a dollar every two days when he was told by the "custodies people" that America was a good country, and that he could be admitted here; that while he had \$250 gold with him at Manila, he had only \$55 gold on his arrival at San Francisco; that his uncle and his brother in Shanghai are holding \$200 gold watch which belongs to him, but that he has no evidence to corroborate

this statement; that he intends to become a farm laborer in the United States. The record in this case further shows that said alien had been arrested under a warrant issued on October 5, 1913, by the Acting Secretary of Labor, charging him with being a member of the excluded classes in that he was a person likely to become a public charge at the time of his entry in the United States; and, in addition, as a circumstance, said record further shows that said Bishan Singh was an alien of the Hindoo race; that there existed in the United States, and particularly [269] in the State of California, in which community affidavits filed on behalf of said alien stated that he could secure employment, a prejudice and antipathy against members of that race; and that the specific causes that had led up to and created the said prejudice and antipathy, wherefrom it had been found that aliens of the said race when associated with circumstances with which this alien Bishan Singh in his aforesaid claims alleged that he was surrounded, were likely to become public charges in the United States.

4. The said record in the case of said alien Foman Singh shows that when duly examined under the Immigration laws and rules at Angel Island, California, on August 5, 1913, the said alien claimed:

That he was 20 years old, and was born in India, which country he left one year and eight months before the said examination, he first going to Shanghai, where he lived for a year and a half after, and then going to Manila; that in Shanghai he was a watchman at about \$11.50 gold a month; that while

in Shanghai he heard that he could get very good employment in Manila, and so went there on June 20, 1913 (his certificate showed that he arrived at Manila on June 20, 1913); that he peddled clothes in Manila, averaging sixty cents to seventy-five cents gold a day profit; that he heard that this was a very good country, and so he decided to come here; that while he had \$175 gold when he arrived at Manila, he had only \$50 gold upon his arrival in San Francisco; that he intended in this country to do farming, gardening, or any [270] kind of work. The record in this case further shows that said alien had been arrested under a warrant issued on October 5, 1913, by the Acting Secretary of Labor, charging him with being a member of the excluded classes in that he was a person likely to become a public charge at the time of his entry in the United States; and, in addition, as a circumstance, said record further shows that said Foman Singh was an alien of the Hindoo race; that there existed in the United States, and particularly in the State of California, in which community affidavits filed on behalf of said alien stated that he could secure employment, a prejudice and antipathy against members of that race; and that the specific causes that had led up to and created the said prejudice and antipathy, wherefrom it had been found that aliens of the said race when associated with circumstances with which this alien Foman Singh in his aforesaid claims alleged that he was surrounded, were likely to become public charges in the United States.

5. The said record in the case of said alien Jagat

Singh shows that when duly examined under the Immigration laws and rules at Angel Island, California, on August 5th, 1913, the said alien claimed:

That he was 29 years old, married, and was born in India, where his wife was living; that he left India over five years before, first going to Shanghai, where he lived five years and three months, and then going to Manila; that he was employed in the Shanghai police department at about \$11 gold a month; that he heard that he could get better employment in Manila, and so went [271] there on June 20, staying fifteen or sixteen days, when he embarked for the United States (his certificate showed that he arrived at Manila on June 20, 1913); that he did nothing in Manila, and did not try to find work there, because he learned that there was a surplusage of field labor there; that he was then told upon inquiring by the "customs people" that he could come to the United States; that while he had \$250 gold when he came to Manila, he had only \$155 gold when he arrived at San Francisco; that he had no other money anywhere; that when he worked he sent all the money he earned to his wife; that his parents were then caring for her; that he would perform any kind of work in the United States that he could get. The record in this case further shows that said alien had been arrested under a warrant issued on October 5, 1913, by the Acting Secretary of Labor, charging him with being a member of the excluded classes in that he was a person likely to become a public charge at the time of his entry in the United States; and, in addition, as a circumstance, said record further

shows that said Jagat Singh was an alien of the Hindoo race; that there existed in the United States, and particularly in the State of California, in which community affidavits filed on behalf of said alien stated that he could secure employment, a prejudice and antipathy against members of that race; and that the specific causes that had led up to and created the said prejudice and antipathy, wherefrom it had been found that aliens of the said race when associated with circumstances with which this alien Jagat Singh in his aforesaid claims alleged that he was surrounded, were likely to become public charges in the United States. [272]

6. The said record in the case of said alien, Jamut or Jawat Singh, shows that when duly examined under the Immigration laws and rules at Angel Island, California, on August 5, 1913, the said alien claimed:

That he was 24 years old, and was born in India, which country he left five years before the said examination, going first to Shanghai, where he stayed five years, and where he was employed as a watchman at \$10 gold a month; that upon hearing that some people made \$20 gold a month in Manila he proceeded there on June 20, 1913 (his certificate showed that he arrived at Manila on June 20, 1913); where he remained fifteen days; that he was unable to find employment at \$20 gold a month in Manila and so, upon hearing that this country was a "great place," he came here; that he understood farming, but if he could not get any farm work to do he would "try to get some business of his own"; that while he had

\$175 gold when he arrived at Manila, he had only \$50 gold on his arrival at San Francisco, which was all the money he had anywhere. The record in this case further shows that the said alien had been arrested under a warrant issued on October 5, 1913, by the Acting Secretary of Labor, charging him with being a member of the excluded classes in that he was a person likely to become a public charge at the time of his entry in the United States; and, in addition, as a circumstance, said record further shows that said Jamut, or Jawat Singh was an alien of the Hindoo race; that there existed in the United States, and particularly in the State of California, in which community affidavits filed on behalf [273] of said alien stated that he could secure employment, a prejudice and antipathy against members of that race; and the specific causes that had led up to and created the said prejudice and antipathy, wherefrom it had been found that aliens of the said race when associated with circumstances with which this alien Jamut or Jawat Singh in his aforesaid claims alleged that he was surrounded, were likely to become public charges in the United States.

7. The said record of the case of said alien Mada Ram shows that when duly examined under the Immigration laws and rules at Angel Island, California, on August 5, 1913, the said alien claimed:

That he was 30 years old, married, and born in India, where he had a wife and two children; that he had kept a grocery and provision shop in India, but left there for Hongkong in search of better business; that he stayed in Hongkong less than a month, where

he was unemployed; that then, on June 20, 1913, he went to Manila (his certificate showed that he arrived at Manila June 9, 1913), where he was engaged for about a month, until his departure for San Francisco, in peddling clothes, at which occupation he made from \$10 to \$20 gold; that he had \$150 gold when he landed at Manila, but had only \$60 gold when he arrived at San Francisco; that he had from 1,000 to 1,500 rupees in his native country, but had no evidence of it; that if permitted to come into the United States he would do laboring work; or whatever work he could get. The record in this case further shows that the said alien had been arrested under a warrant issued on October 5, 1913, [274] by the Acting Secretary of Labor, charging him with being a member of the excluded classes in that he was a person likely to become a public charge at the time of his entry in the United States; and, in addition, as a circumstance, said record further shows that said Mada Ram was an alien of the Hindoo race; that there existed in the United States, and particularly in the State of California, in which community affidavits filed on behalf of said alien stated that he could secure employment, a prejudice and antipathy against members of that race; and that the specific causes that had led up to and created the said prejudice and antipathy, wherefrom it had been found that aliens of the said race when associated with circumstances with which this alien Mada Ram in his aforesaid claims alleged that he was surrounded were likely to become public charges in the United States.

8. The said record in the case of said alien Ferroz Khan shows that when duly examined under the Immigration laws and rules at Angel Island, California, on August 5, 1913, the said alien claimed:

That he was 25 years old, and was born in India, which country he left one year before the said examination, going first to Singapore, where he stayed eight days, doing nothing, and then going to Manila (his certificate showed that he arrived at Manila October 24, 1912); that in India he worked upon his father's farm; that he left India to look for work; that at Manila he was first employed as a day laborer and afterwards as a watchman "in some house," receiving about \$20 gold a month; that upon hearing that this was a good country and that he [275] could enter San Francisco freely he came here; that he had \$233 gold when he arrived at Manila, but had only \$45 gold upon his arrival at San Francisco; that it was his expectation to do farm work in the United States; that he had a brother in Manila who had \$100 gold belonging to him. No evidence whatever was offered to corroborate the statement of this alien that he had \$100 gold belonging to him in Manila. The record in this case further shows that when this alien landed at Manila a bond in the sum of \$250 was furnished, conditioned that he would not become a public charge; that he was arrested under a warrant issued on October 5, 1913, by the Acting Secretary of Labor, charging him with being a member of the excluded classes in that he was a person likely to become a public charge at the time of his entry in the United States; and, in addition, as a circum-

stance, said record further shows that said Ferroz Khan was an alien of the Hindoo race; that there existed in the United States, and particularly in the State of California, in which community affidavits filed on behalf of said alien stated that he could secure employment, a prejudice and antipathy against members of that race; and that the specific causes that had led up to and created the said prejudice and antipathy, wherefrom it had been found that aliens of the said race when associated with circumstances with which this alien Ferroz Khan in his aforesaid claims alleged that he was surrounded, were likely to become public charges in the United States.

9. The said record in the case of said alien Mahbub Ali shows that when duly examined under the Immigration laws and rules at Angel Island, California, on [276] August 12, 1913, the said alien claimed:

That he was 19 years old, and was born in India, which country he left in July, 1912, going first to Singapore, where he stayed four or five days, then to North Borneo, and from North Boreno to Manila on September 13, 1912 (his certificate showed that he was landed at the port of Jolo, Philippine Islands, September 1, 1912); that in his native country he did no work, but attended school, being supported by his father; that he went to Manila "for education"; that the superintendent of the high school at Manila told him to go to America; that "they did not admit him" to any school in the Philippine Islands; that while in Manila the employer of his brother, which brother worked in "some stable" there, "gave him a job to look after some horses as a sort of supervision,"

for which he received no salary, he being in effect an assistant of his brother; that his brother supported him and paid the expenses of his coming to this country; that he had four pounds (about \$20 gold) when he entered the Philippine Islands; that while in Manila his father, who was a grain merchant in India, sent him 150 rupees; that his father had dependent upon him for support two daughters and one other son; that he had no relatives in this country, but a friend of his brother's lived in San Francisco; that he intended to enter the Mission High School in San Francisco; that he would be dependent for support while attending school here upon remittances from his father; that he had no evidence to corroborate his statement that his father would send such remittances; that he had never been in the United States before; that he had no document [277] showing attendance at any school, he having had a certificate which he handed to said superintendent of the high school in Manila, and which the latter had not returned to him, having mislaid the same; that all the money he had upon his arrival at San Francisco was \$45 gold. The record in this case further shows that said alien had been arrested under a warrant, issued on October 5, 1913, by the Acting Secretary of Labor, charging him with being a member of the excluded classes in that he was a person likely to become a public charge at the time of his entry in the United States; and, in addition, as a circumstance, said record further shows that said Mahbub Ali was an alien of the Hindoo race; that there existed in the United States, and particularly

in the State of California, in which community affidavits filed on behalf of said alien stated that he could secure employment, a prejudice and antipathy against members of that race; and that the specific causes that had led up to and created the said prejudice and antipathy, wherefrom it had been found that aliens of the said race when *when* associated with circumstances with which this alien Mahbub Ali in his aforesaid claims alleged that he was surrounded, were likely to become public charges in the United States.

10. The said record in the case of said alien Abdoolah Khan shows that when duly examined under the Immigration laws and rules at Angel Island, California, on August 5, 1913, the said alien claimed: [278]

That he was 35 years old, married, had two children, and was born in India; that he was a farmer in India, owning a farm there; that his hair was gray on account of worry; that he left his native country five months before the said examination, going first to Hongkong where he stayed for two months without employment, and then to Manila, where he stayed fifteen to twenty days (his certificate showed that he arrived at Manila June 19, 1913); that "I came to Hongkong with the original intention of doing some farming or other business, but I could not find anything in Hongkong, so I went to Manila because I heard about good prospects there"; that he heard in Hongkong that prospects were good in Manila; that he did nothing in Manila, having been unable to find employment there; that he came to this country be-

cause he heard that this was a good country and that he could get some work here; that he had \$50 gold when he arrived at Manila; that his expenses in coming here were paid by his brother in Manila; that he had \$50 on his arrival in San Francisco; that he expected to seek work as a laborer in this country. This alien produces no documentary or other evidence in support of his claim that he owned a farm in India. The record in this case further shows that the said alien was landed at Manila under a bond in the sum of \$250 conditioned that he would not become a public charge in the Philippine Islands; that said alien had been arrested under a warrant issued on October 5, 1913, by the Acting Secretary of Labor, charging him with being a member of the excluded classes in that he was a person likely to become a public charge at the time of his entry in the United States; and, in addition, as a circumstance, said record further shows [279] that said Abdoolah Khan was an alien of the Hindoo race; that there existed in the United States, and particularly in the State of California, in which community affidavits filed on behalf of said alien stated that he could secure employment, a prejudice and antipathy against members of that race; and that the specific causes that had led up to and created the said prejudice and antipathy, wherefrom it had been found that aliens of the said race when associated with circumstances with which this alien Abdoolah Khan in his aforesaid claims alleged that he was surrounded, were likely to become public charges in the United States.

1. As to subdivision 1 of paragraph 8 of the Petition, respondent admits all allegations contained therein, except that the warrant of deportation referred to was issued on August 5, 1913, and that it was charged, among other things, in the application referred to for warrant of arrest of said aliens Sundar or Sandu Singh, Naron Singh, Bishan or Bishen Singh, Foman Singh, Jagat or Jagot Singh, Jamit or Jawat Singh, Mada Ram or Mado Pan, Ferroz Khan, and Abdoolah or Abdulla Khan "that there is a strong prejudice against them"; but, on the contrary, respondent alleges that said warrant of deportation was issued on October 5, 1913, and that said application for warrant for arrest of each of said aliens contained the statement, "There exists a strong prejudice against them *in this locality*," and not as alleged in the petition as aforesaid, "that there is a strong prejudice against them." [280]

2. As to subdivision 2 of paragraph 8 of the Petition respondent admits the allegations contained therein, except that respondent denies that in his examination referred to, any of said aliens answered to the best of his ability all of the questions that were propounded to him by Inspector R. E. Peabody.

3. As to subdivision 3 of paragraph 8 of the Petition, respondent admits that neither said Sundar or Sundu Singh, nor any of the other nine aliens hereinbefore mentioned, was informed of the charges or allegations made against him, or of the issuance of the warrant for his arrest, until the conclusion of his examination; but respondent alleges that this was, in the case of each of said aliens, in accordance with

rule 22, subdivision 4 of the Immigration rules, which provides that the alien shall be allowed to inspect the warrant of arrest and all evidence *evidence* on which it is issued during the course of the hearing.

4. As to subdivision 4 and 5 of paragraph 8 of the Petition, respondent admits the allegations contained therein, and further alleges that each of said aliens was examined separately and without reference to the cases of the other said aliens, or to the case of any of the other said aliens, and that all such evidence as was at any time offered in the case of each or any of the said aliens, or in the cases of all of the said aliens, was taken and received, and that full opportunity was given each, any and all said aliens, and his and their attorneys, to offer or submit any evidence he or they desired.

5. As to subdivision 6 of paragraph 8 of the [281] Petition, respondent admits the allegations contained therein, and further alleges that the affidavits referred to were filed in behalf of the said aliens collectively; and that said affidavits were in effect declarations concerning Hindoos generally as a people or race, and did not refer to the said aliens in whose behalf this petition was filed individually, but treated them generally as members of the Hindoo people or race.

6. As to subdivision 7 of paragraph 8 of the Petition, respondent admits the allegations contained therein, except (1) that respondent said at the time or stage of the proceedings in the cases referred to in the petition that "the case would be at once sent to the Secretary of Labor for decision and judgment,

and that no further evidence and no further hearing or testimony would be introduced, held or heard on one side or the other"; and (2) that at the said time or stage of the proceedings in the cases there was no evidence to support the charges that these aliens would ever become public charges, or that they were or ever would be likely to become public charges. These allegations respondent denies, and as to (2) alleges that there was substantial evidence that each such alien was a person likely to become a public charge at the time of his entry into the United States, as charged in the said warrant of arrest.

7. As to subdivision 8 of paragraph 8 of the Petition, respondent denies the allegations contained therein.

8. As to subdivision 9 of paragraph 8 of the Petition, respondent denies the allegations contained therein, [282] except (1), that certain affidavits, interviews, and letters were placed in the records of the cases of said aliens by the Government, and (2) that no opportunity was given any of the said aliens or their attorneys to cross-examine the persons who made the affidavits, gave the interviews, or wrote the letters referred to. Respondent alleges (1) that these affidavits, interviews and letters were introduced in the records of the cases of the said aliens by the Government because of the previous introduction therein by the said aliens of the affidavits referred to in subdivision 6 of paragraph 8 of the petition, and referred to in subdivision 5 of paragraph V of this Return, and for the purpose of *rebutting* the general and circumstantial allegations contained in

the last mentioned affidavits with evidence of a like general circumstantial nature; and respondent further alleges (2) that no opportunity contemplated by the Immigration laws and rules to cross-examine any persons was denied any of the said aliens or their attorneys.

9. As to subdivision 9 of paragraph 8 of the Petition, respondent admits that after introducing into the records of the said aliens the before mentioned affidavits, interviews and letters, the respondent invited a counter-showing and additional brief on behalf of any or all of said aliens, but denies that said aliens and their attorneys "filed for record a respectful, but earnest protest" against the procedure adopted by the Department of Labor in reopening of the record; but, on the contrary, respondent alleges that on receipt of respondent's letter dated September 25th, 1913, notifying one of the said alien's [283] attorneys that additional evidence—meaning the said affidavits, interviews, letters and the newspaper clippings to be referred to hereafter—had been added to the records in the cases of the said aliens by the Government, and that said attorney was entitled to inspect and copy the same as well as to pursue such action in view of the same as he deemed proper in behalf of his clients, the said attorney replied to the said letter of respondent by a letter dated September 27, 1913, thanking respondent for the courtesy of informing him that he would be permitted to inspect the additional evidence, and offer further evidence, but making no complaint or protest whatsoever to the introduction in the record

by the Government of the said additional evidence. Respondent further alleges that it was not until some time thereafter, and then only in the final brief submitted by the attorneys in behalf of said aliens, that any protest was made to the introduction of said additional evidence by the Government; and respondent further alleges that accompanying said brief were further affidavits, offered in behalf of the said aliens, circumstantial in their nature in that the declarations contained in them referred to Hindoos generally as a people or race, and not to the said aliens, Sundar or Sundu Singh, Naron Singh, Bishan or Bishen Singh, Foman Singh, Jagat or Jagot Singh, Jamit or Jawat Singh, Mada Ram or Mado Pan, Ferroz Khan, Mahbub or Mahbut Ali, Abdoolah or Abdulla Khan individually, which said affidavits were accepted and placed in the records of the cases of the said aliens and submitted to the Department of Labor for consideration and decision. [284]

10. As to subdivision 10 of paragraph 8 of the Petition, respondent admits that in forwarding the said records of the cases of the said aliens to the Department of Labor for consideration and decision, he wrote a letter addressed to the Commissioner-General of Immigration, Washington, D. C., in which was expressed his views upon the cases of said aliens, which said letter was, under the practice that obtains in such cases in the Department of Labor, considered a confidential communication, not subject to inspection by aliens or their attorneys. Respondent further admits that as a part of the said records transmitted to the Department of Labor were a large

number of newspaper clippings relative to Hindoos, but states that said newspaper clippings were filed merely as a rebuttal of the aforesaid affidavits filed in behalf of the said aliens. Respondent has in his possession said letter and newspaper clippings and stands ready to produce them should their production be desired.

VI.

As to paragraphs 9, 10 and 11 of the Petition, respondent denies the allegations contained therein.

VIII.

As to paragraph 12 of the petition, respondent admits that he stands ready under said warrant of deportation to deport each of the said aliens should he be permitted to do so by this Honorable Court; but respondent denies that any or all of the said aliens have exhausted all their rights and remedies before the Department of Labor, in that none of them have ever applied for a reopening [285] or a reconsideration of their cases by the said Department.

WHEREFORE, your respondent prays that a writ of *habeas corpus* do not issue herein, that the Order to Show Cause be discharged, and that the Petition be dismissed.

BENJ. L. McKINLEY,
United States Attorney,
Attorney for Respondent.

WALTER E. HETTMAN,
Assistant U. S. Attorney,
Of Counsel. [286]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Charles D. Mayer, being first duly sworn, deposes and says:

That he is an Immigrant Inspector connected with the Immigration Service for the port of San Francisco, and has been specially directed to appear for, and represent the respondent, Samuel W. Backus, Commissioner of Immigration, in the within-entitled matter; that he is familiar with all the facts set forth in the within Return to Order to Show Cause, and knows the contents thereof; that it is impossible for the said Samuel W. Backus to appear in person or to give his attention to said matter; that of affiant's own knowledge, the matters set forth in the Return to Order to Show Cause are true, excepting those matters which are stated on information and belief, and that as to those matters, he believes it to be true.

CHARLES D. MAYER.

Subscribed and sworn to before me this 28th day of November, 1913.

[Seal] FRANCIS KRULL,
United States Commissioner, North'n Dist. of California.

Service of the within Amended return by copy admitted this first day of December, 1913.

JOHN L. McNAB,
TIMOTHY HEALY,
Attorneys for Petitioner.

[Endorsed]: Filed Dec. 1, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [287]

(Style of Court, Titles, and Numbers of Causes.)

Opinion and Order Denying [Application for a Writ of Habeas Corpus.]

JOHN L. McNAB and TIMOTHY HEALY,
Counsel for the Petitioner.

WALTER E. HETTMAN, Assistant United
States Attorney, for the Government.

These cases involve the right of the individuals named to land at the port of San Francisco, [288] having already been landed at Manila and coming thence here. Upon their arrival they were arrested and, after a hearing, ordered deported as persons likely to become public charges.

It is sought to have the action of the Department of Commerce and Labor denying their right to land and ordering their deportation reviewed by this court, on three general grounds:

1. Because they were not accorded a fair hearing by the Immigration officers, at this port.

2. Because there is no evidence to support the finding that each of said petitioners is a person likely to become a public charge.

3. Because having already been permitted to land at Manila, they are entitled, coming thence to the Mainland, to be landed here as a matter of right, and without further examination.

The assignment that the petitioners were not accorded a fair hearing by the Immigration officers

is predicated chiefly upon the fact that on or about August 20th, 1913, and after the testimony of the petitioners had been taken and certain affidavits filed in their behalf, the petitioners and their attorneys were informed by the Immigration authorities that the cases were closed, and that thereafter, on or about September 25th, 1913, they were informed that the cases had not been closed on August 20th, but that the Government had secured and presented other evidence in opposition to the right of petitioners to land. [289] The contention that the hearing was unfair in this regard cannot be upheld. On September 27th the attorney for petitioner addressed to the Immigration Commissioner a letter as follows:

“This is in response to your letter advising me that new evidence has been taken by the Government in the case of a group of Hindoos, and that we will now be permitted to inspect the same, and offer further evidence.

I thank you for the courtesy of the information.”

Having been accorded the opportunity to inspect the new evidence and controvert it if they desired, and having as a matter of fact presented further evidence, they were accorded a fair hearing within the meaning given those words by the adjudicated cases. When such is the case the order of the executive officers within the authority of the statute is final, if there be any evidence at all to support their determination.

It is contended that there is no such evidence in

the present cases, this being the second ground upon which the order of the Immigration officers is assailed. The question presented by this assignment is of extreme importance, and its determination either way will have a wide and far-reaching effect.

The Department rests its action upon the right given it by Statute to exclude "persons likely to become a public charge." Certain affidavits were introduced in the present cases tending to show, among other things, that the Hindoo laborers are obnoxious to very many of our people; that there exists a prejudice [290] against them, and that comparatively few avenues are open to them in which to find employment. This showing is not made as against any particular individual petitioner, but as against the Hindoos generally as a race. In these cases the application for the warrant of arrest was based upon the fact as set forth therein that the "above aliens are likely to become public charges for the reason that they are of the laboring class; that there is no demand for such labor, and there exists a strong prejudice against them in this locality." The warrant of arrest and the order of deportation are based upon the fact as set forth in each of them:

"That the said aliens are members of the excluded classes in that they were persons likely to become public charges at the time of their entry into the United States."

The finding that they were persons likely to become public charges is based in reality, however much the Immigration officers may disclaim the fact,

upon the general showing and implied finding that there is a prejudice against the Hindoo, and little demand for his labor. It is true that there was a strong counter-showing made by petitioners, but the matter having been passed on by the Department and there being some evidence to support the implied finding, the merits of the case in this regard are no longer open, and may not be reviewed by the Courts. The question then presented, stripped of all its masks, is the following:

“May the Department of Commerce and Labor upon a showing satisfactory to itself [291] and a finding not open to review that a prejudice exists in this country against aliens of any race and that there is no demand for the labor of such race, exclude all laborers of such race on the ground that they are, for such reasons, likely to become public charges?”

Stated thus, if it were a new question, I would not hesitate a moment to answer in the negative. But the Supreme Court has gone so far in holding that the findings of the Department cannot be reviewed if there be any testimony at all to support them, that I am not prepared to deny to it the power implied in the foregoing question. The Department has the power to pass upon the facts of each individual case. And if it determine upon any substantial evidence that there is no demand for the labor of an alien applying for admission, and that a prejudice exists against him and for these reasons conclude that, if admitted, he would be likely to become a public charge, the Court cannot say, when the alien must

depend upon securing labor in order to subsist, that this conclusion is so without support as to require it to be set aside. But let there be no delusion that this power, once conceded, can be used only in the case of Hindoos. It is equally applicable to every other race. Conceding the power to the Department of Labor to exclude the Hindoo laborer for this reason, we must concede to it the power to exclude, for the same reason, the laborer of any other race. It is a vast power, and one which, upon the argument of this case, I was very unwilling to believe was lodged in any executive Department of the Government. But an examination of the adjudicated cases shows a [292] uniform holding that whenever an alien has had an opportunity to present such testimony as he desired to present, the conclusions of the Department of Commerce and Labor, upon the facts, are not open to review if there be any testimony to support them. Nor can the Courts inquire whether or no such conclusions are wrong. In the present cases, therefore, the Department, having the right to determine the facts as to whether these petitioners are persons likely to become public charges, has determined that they are. The fact that this determination is based upon conditions existing in this country, rather than upon any particular physical or mental defect in the individual petitioners, does not in my judgment make such determination any the less final, or render it any more open to review by the Courts. For a strong man unable to obtain an opportunity to labor is just as helpless as a weak one unable to perform such labor if the opportunity

were afforded him. For these reasons the order of deportation cannot be disturbed because of failure of proof. There is left then to be considered only the third contention of petitioners, that having been permitted to land at the port of Manila, they are entitled to come to the Mainland without further question.

The Statute provides that the Commissioner General of Immigration shall have charge of the administration of all laws relating to the immigration of aliens into the United States, and shall establish such rules and regulations, not inconsistent with law, as he shall deem best calculated for carrying out the [293] provisions of the Immigration Act. At the time that some of these petitioners landed in the Philippines, Rule 14 of the Immigration Rules was as follows in so far as applicable here:

“Sec. 1. Aliens arriving in the Philippines bound for the Continent shall be inspected and given a certificate signed by the insular collector of customs at Manila showing the fact and date of landing.”

“Sec. 2. Aliens who, having been manifested *bona fide* to the Philippines and having resided there for a time, signify to the insular collector of customs at Manila an intention to go to the Continent shall be furnished such certificate, as evidence of their regular entry at an insular port.”

“Sec. 3. Aliens applying at continental ports and surrendering the certificate above described shall, upon identification, be admitted without further examination.”

On June 16th, 1913, however, the foregoing rule was amended to read as follows:

“Sec. 3. Aliens applying at continental ports and surrendering the certificate above described shall, upon identification, be permitted to land, provided it appears that at the time such aliens were admitted to the Philippines they were not members of the excluded classes, or likely to become public charges if they proceeded thence to the Mainland.”

Some of the petitioners here landed at Manila on June 20th, 1913, after the foregoing amendment was in force. But whether they landed at Manila before or after the amendment does not seem to me to be at all [294] material, as the amendment was in force for some time before any of them left the Philippines for the Mainland. It is urged that this amendment is beyond the power of the Department to enact, and that an alien once landed in any territory, or other place subject to the jurisdiction of the United States, may freely go thence to any portion of the United States whether it be the Mainland or any of its island possessions. With this conclusion I am unable to agree.

There may be reasons for rejecting an alien at continental ports which would not exist if he were applying to enter the Philippines. Labor and climatic conditions and standards of living are so diverse, that one going to the Philippines who would not there be likely to become a public charge, might well be likely to become such if he proceeded thence to the Mainland. A more rigid test may, therefore,

well be applied to those seeking admission to the Mainland than that applied to those seeking admission to the Philippines. And as the amendment to the Immigration Rules providing that the possession of a certificate of lawful entry into the Philippines should not be conclusive as to the holder's right to enter a continental port was in effect at the time that all of these petitioners sailed from Manila, the question was properly open for investigation by the Immigration officers here as to whether or no at the time these aliens were admitted to the Philippines, they were likely to become public charges if they proceeded thence to the Mainland. This question was investigated upon their arrival here, and was decided adversely to the [295] petitioners. As we have heretofore seen this decision is final and not subject to review.

The application for a writ of *habeas corpus* must, therefore, be denied, and it is so ordered.

December 5th, 1913.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Dec. 5, 1913. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [296]

(Style of Court, Titles and Numbers of Causes.)

Petition and Notice of Appeal.

Now comes the petitioner above named, and the persons above named upon whose behalf said petition is filed, appellants herein, through their attorneys,

and feeling themselves aggrieved at the Order and Judgment of the above-entitled court made and entered on the fifth day of December, 1913, denying the Petition for Writ of Habeas Corpus, and hereby appeal from said Order and Judgment made as aforesaid, to the United States Circuit Court of Appeals for the Ninth Circuit because of certain errors made to their prejudice, all of which will appear more in detail from the assignment of errors which is filed herewith.

WHEREFORE, appellants pray that an appeal may be granted in their behalf to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and further, that a transcript of the record, proceedings, and papers in the above-entitled cause, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California, January 12th, 1914.

JOHN L. McNAB,
TIMOTHY HEALY,
Attorneys for Petitioner and Appellants. [297]

(Style of Court, Titles and Numbers of Causes.)

Assignment of Errors.

Now comes Timothy Healy and files the following assignment of errors upon which he will rely on his appeal this day taken from the order and judgment

made by this Court on the 5th day of December, 1913, denying the petitions of said Timothy Healy for a writ of *habeas corpus* in each of the above causes.

I.

That the said District Court erred in denying the petition filed on behalf of the said petitioner for a writ of *habeas corpus* in each of the above causes for and on behalf of the persons above named, who have been referred to in pleadings and argument as "TWENTY-TWO HINDOOS."

II.

That the said District Court erred in not granting the said petitions for writs of *habeas corpus* prayed for on behalf of the said "TWENTY-TWO HINDOOS."

III.

That said District Court erred in not taking jurisdiction of said petitions for a writ of *habeas corpus*, and in not granting said writ of *habeas corpus*, as prayed for in said petitions.

IV.

That said District Court erred in dismissing said petitions, for the writ of *habeas corpus*.

V.

That the persons referred to as "TWENTY-TWO HINDOOS," for and on whose behalf the said petitions for the writ of *habeas corpus* were filed, are restrained of their liberty without due process of law in violation of the 14th Amendment of the Constitution. [298]

VI.

That the Commissioner of Immigration and the

Secretary of Labor are and each is without jurisdiction to imprison, detain or restrain of their liberty the said "TWENTY-TWO HINDOOS."

VII.

That the alleged order or warrant for the deportation of the said "TWENTY-TWO HINDOOS" from the United States to India was and is without authority of law, without and in excess of jurisdiction, and null and void, and each and both of such alleged orders or warrants of deportation are likewise and for the same reasons null and void.

VIII.

That said "TWENTY-TWO HINDOOS" were denied due process of law in this, that they were and are ordered deported without any fair hearing or any hearing, and were denied the equal protection of the law guaranteed by the Constitution and Laws of the United States by the treaty existing between the United States of America and Great Britain according to them the equal protection of law guaranteed to any subject of the most favored nation and also by the rules of regulation of the Department of Labor now and then enforced.

IX.

That said "TWENTY-TWO HINDOOS" were denied due process of law, the equal protection of the law, arrested, imprisoned and ordered deported from this country without being given the right to counsel to represent and defend them in every stage of the proceedings in violation of the fundamental right of personal liberty.

X.

That said "TWENTY-TWO HINDOOS" are ar-

rested and ordered deported without due process of law, in this, the judgment and [299] alleged order or warrant of deportation in each and all of the cases were and are entered and issued against them without a fair or any hearing, without receiving or reproducing any evidence to support the charge alleged against them and by denying their constitutional right to be confronted by witnesses against them.

XI.

That said "TWENTY-TWO HINDOOS" were not at the time of the judgment and issuance of the alleged orders or warrants of deportation alien or other immigrants and therefore not subject to any provisions of the acts of Congress in that regard enacted.

XII.

That said "TWENTY-TWO HINDOOS" are not subject to deportation in the manner nor for the reasons herein invoked, and that they are domiciled resident aliens within the United States and were such at the time of the entry of judgment and the issuance of the alleged orders or warrants of deportation.

XIII.

That said District Court erred in holding that the "TWENTY-TWO HINDOOS" were or are subject to deportation on a showing that is not made as against any particular one of them, but as against the Hindoos generally as a race.

XIV.

That said District Court erred in holding that the Department of Labor may on finding that a prejudice exists in this country against aliens of any race and

that there is no demand for the labor of such race, exclude all laborers of such race, on the ground that they are, for such reasons likely to become public charges and that the members of such race likewise may be deported for the same reasons. [300]

XV.

That the said District Court erred in holding that the *the* Immigration Act empowers the Secretary of Labor and the Commissioner General of Immigration to amend the Rules and Regulations for the enforcement of the Immigration Act in such manner as deny the right and privilege of an alien once landed in any territory, or other place subject to the jurisdiction of the United States, freely to go thence to any portion of the United States whether it be the Mainland or any of its island possessions.

XVI.

That the said District Court erred in holding that conditions existing in a particular part of the territory and jurisdiction of the United States, rather than the physical or mental condition of an individual, is to be held solely proper and sufficient ground upon which to base a judgment and order of deportation, of an alien admitted in another part of the territory and jurisdiction of the United States.

XVII.

That the said District Court erred in holding that as to aliens already domiciled in the United States and admitted at the port of Manila, Philippine Islands, an amendment of the Rules and Regulations might be subsequently made revoking the conclusiveness of a certificate of law entry at the Port of Manila

upon its presentation at a port of the Mainland of the United States, and thereby subjecting the alien resident to the inquiry which the Immigration Act provides shall be directed to the alien immigrant making original application for admission into the country.

XVIII.

That said District Court erred in holding that the said [301] "TWENTY-TWO HINDOOS" came within any of the classes of aliens who should be deported from the United States, in this, that there is no evidence to show that they should be deported or that they come within any of the classes of aliens resident in the United States for whom the statute provides deportation, and that there is no evidence that they are unlawfully in the country.

JOHN L. McNAB,
TIMOTHY HEALY,

Attorneys for Said Petitioners and Appellants.

[Endorsed]: Filed Jan. 12, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [302]

(Style of Court, Titles and Numbers of Causes.)

Order Allowing Appeal.

The petitioner above named, and the persons above named upon whose behalf said petition is filed, appellants herein have, through their attorneys, presented to this Court on January 12th, 1914, their Petition on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, upon the order and judgment made and entered by this Court on

the 5th day of December, 1913, denying their petition for a writ of *habeas corpus*, and having presented to the Court at the same time their assignment of errors, and having by their counsel moved the court for an order allowing said appeal;

IT IS HEREBY ORDERED that said appeal be and the same is hereby allowed; and, further, that a certified transcript of the record and proceedings and papers be prepared and transmitted by the clerk of this court to the United States Circuit Court of Appeal within the time prescribed by law;

AND IT IS FURTHER ORDERED that during the pendency of this appeal all proceedings against the above-named persons be stayed.

Done in open court this 12th day of January, 1914.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed Jan. 12, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [303]

Citation on Appeal—Copy.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Samuel W. Backus, as Commissioner of Immigration at the Port of San Francisco, for the United States Government, and to John W. Preston, United States Attorney for the Northern District of California, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San

Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, First Division, wherein Timothy Healy is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [304]

WITNESS, the Honorable MAURICE T. DOOLING, United States District Judge for the Northern District of California, this 4 day of June, A. D. 1914.

M. T. DOOLING,

United States District Judge.

United States of America,—ss.

On this fourth day of June, in the year of our Lord one thousand nine hundred and fourteen, personally appeared before me F. D. MONCKTON, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the subscriber, TIMOTHY HEALY and makes oath that he delivered a true copy of the within citation to JOHN W. PRESTON, as United States Attorney for the Northern District of California.

TIMOTHY HEALY.

Subscribed and sworn to before me at San Francisco, California, this 4th day of June, A. D. 1914.

[Seal]

F. D. MONCKTON,

Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed Jun. 6, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [305]

(Style of Court, Title, and Number of Cause.)

Stipulation as to Printing of Transcript on Appeal.

It is hereby stipulated and agreed that the title of the cause and court, except as to the first paper filed in the proceeding, or any of the endorsements upon any of the papers to be printed, for the citation, petition and notice of appeal, order allowing appeal, bond to appear, praecipe for record need not be printed in the transcript of record on appeal.

San Francisco, Cal., January 12, 1914.

JNO. W. PRESTON,
United States Attorney.
JOHN L. McNAB,
TIMOTHY HEALY,
Attorneys for Appellants.

[Endorsed]: Filed Jan. 14, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [306]

(Style of Court, Title, and Number of Cause.)

Amended Stipulation Re Exhibits.

It is hereby stipulated and agreed that the copies of ORIGINAL EXHIBITS introduced in the above-entitled matter, which copies are attached to the petitions for the above-mentioned writs of *habeas corpus*, may be detached from the petitions by the clerk of the above-entitled court, and may be transmitted in the form in which they are at present, to the Clerk of

the United States Circuit Court of Appeals for the Ninth Circuit to be used and made a part of the record on appeal in the above-entitled matter.

Dated January 23d, 1914.

JOHN W. PRESTON,
United States Attorney.

JOHN L. McNAB,
TIMOTHY HEALY,
Attorneys for Appellants.

So ordered.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jan. 22, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [307]

**Certificate of Clerk U. S. District Court to Transcript
of Record on Appeal.**

I, W. B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing and hereto attached 307 pages, numbered from 1 to 307, inclusive, contain full, true, and correct copies (with the exception of the exhibits attached to each of the petitions and marked respectively "A," "B," "C," "D," "E," "F," "G" and "H," which are transmitted in their original form, as to each case) of certain papers, records and documents as the same now appear on file and of record in this office, in the matters of Rhagat Singh et al., No. 15,479, on *Habeas Corpus*, and Sandu Singh et al., No. 15,480 on *Habeas Corpus*, and which said Transcript is made up pursuant

to and in accordance with "Praecipe" (copy of which is embodied herein) and the instructions of Messrs. John L. McNab and Timothy Healy, attorneys for petitioners and appellants herein.

I further certify that the costs of preparing and certifying said Transcript of Appeal is the sum of Sixty-five Dollars and Eighty Cents (\$65.80), and that the same has been paid to me by the attorneys for the petitioners and appellants herein.

Annexed hereto is the Original Citation issued in the above-entitled matters, and paged 309 and 310.

ATTEST my hand and the seal of said District Court this 17th day of June, A. D. 1914.

[Seal]

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk.

CMT. [308]

Citation on Appeal—Original.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Samuel W. Backus, as Commissioner of Immigration at the Port of San Francisco, for the United States Government, and to John W. Preston, United States Attorney for the Northern District of California, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty

days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, First Division, wherein Timothy Healy, as appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, United States District Judge for the Northern District of California, this 4 day of June, A. D. 1914.

M. T. DOOLING,

United States District Judge. [309]

United States of America,—ss.

On this fourth day of June, in the year of our Lord one thousand nine hundred and fourteen, personally appeared before me F. D. MONCKTON, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the subscriber, TIMOTHY HEALY, and makes oath that he delivered a true copy of the within citation to JOHN W. PRESTON, as United States Attorney for the Northern District of California.

TIMOTHY HEALY.

Subscribed and sworn to before me at San Francisco, California, this 4th day of June, A. D. 1914.

[Seal]

F. D. MONCKTON,

Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 15,479. U. S. Circuit Court of Appeals for the Ninth Circuit. Timothy Healy, Appellant, vs. Samuel W. Backus, as Commissioner of Immigration. Citation on Appeal. Filed Jun. 6, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [310]

[Endorsed]: No. 2436. United States Circuit Court of Appeals for the Ninth Circuit. Timothy Healy, Appellant, vs. Samuel W. Backus, as Commissioner of Immigration at the Port of San Francisco, for the United States Government, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Received and filed June 18, 1914.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

TIMOTHY HEALY, for and on behalf of
RHAGAT SINGH et al. and SUNDAR
or SANDU SINGH et al.,

Appellant,

VS.

SAMUEL W. BACKUS as Commissioner
of Immigration at the Port of San Fran-
cisco, for the United States Government,

Appellee.

OPENING BRIEF FOR APPELLANT.

JOHN L. McNAB,
TIMOTHY HEALY,
Attorneys for Appellant.

Filed this **Filed** day of October, 1914.

OCT 24 1914 FRANK D. MONCKTON, Clerk.

By **F. D. Monckton,** Deputy Clerk.
Clerk.

No. 2436

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TIMOTHY HEALY, for and on behalf of
RHAGAT SINGH et al. and SUNDAR
or SANDU SINGH et al.,

Appellant,

VS.

SAMUEL W. BACKUS as Commissioner
of Immigration at the Port of San Fran-
cisco, for the United States Government,

Appellee.

OPENING BRIEF FOR APPELLANT.

This appeal is from an order of the United States District Court for the Northern District of California, denying appellant's prayer for writs of habeas corpus, and from the decision of the said Court as to the law therein involved.

As this matter throughout the proceedings below has been referred to as "the case of twenty-two Hindoos" it will be so referred to herein.

On the authority of *Wong Heung v. Elliott* (C. C. A.) 179 Fed. 110, appellant states facts.

It is undisputed that these twenty-two Hindoos are, and each of them is, a subject of the King of England and, as such, entitled to the protection of the treaty between the United States and Great Britain, which treaty contains the most favored nation clause.

These twenty-two Hindoos came from the ports of Shanghai and Hongkong, China, and Nagasaki, Japan, to the Port of Manila, Philippine Islands, where they presented themselves as alien immigrants applying for admission into the United States under the provisions of the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910. They were admitted. That they submitted to and were given that full inspection and examination required by the Immigration Act and the rules and regulations of the Department of Labor, and that the question of whether or not they were at the time of admission likely to become public charges was determined is attested by the fact that each of these twenty-two Hindoos was granted a certificate of lawful entry into the United States as required by the rules and regulations of the department. And is further attested by the fact that some of them were required to furnish bonds that they would not become public charges while in the United States. The others were landed without being required to furnish such bonds, according to Section 26 of the Immigration Act.

These twenty-two Hindoos resided for various periods in Manila and pursued their various voca-

tions as opportunity afforded. Subsequently they informed the Insular Collector of Customs of the Port of Manila, as required by the rules, of their intention to go to the mainland of the United States, and, in conformity with Rule 14 of the Immigration Rules then in force, the Insular Collector of Customs furnished to each of these twenty-two Hindoos a certificate entitling the holder, upon arrival at a continental port and proper identification, to land without further examination, and without the payment of the head tax required by law of every alien immigrant applying for admission into the United States, that head tax having been paid by each of these Hindoos upon his admission into the Port of Manila.

But upon the arrival of these twenty-two Hindoos at the Port of San Francisco they were taken into custody by appellee herein. Their certificates of lawful entry, guaranteeing them free landing on the continent without further examination, were utterly disregarded, though it was not charged, nor suggested, that these certificates had been obtained by fraud or misrepresentation at the time of landing. While thus in the custody of appellee herein, they were detained at the immigration station at Angel Island. Appellee herein, or his subordinates, made application for a warrant of arrest, addressed to the Secretary of Labor, charging that these twenty-two Hindoos and each of them were "likely to become public charges". They were given pretended hearings on these charges. They presented, in addi-

tion to the certificates above referred to, various amounts of money, ranging from \$45 to \$160 gold. As the record below shows, they had various amounts of valuable personal and real property in the land of their birth and the cities of their residences in China and Japan. They stated that they left China and Japan to improve themselves in the Philippines and left the Philippines to improve themselves in the mainland. There were also offered by these Hindoos affidavits by a number of responsible employers of large numbers of workers in California, in which affidavits these specific twenty-two Hindoos were offered employment at good wages in occupation that the employers swore offered work for more than five times the number of Hindoos involved herein.

Even were these Hindoos alien immigrants at the time of their arrival at the Port of San Francisco, instead of resident aliens domiciled with certificates of lawful entry under the Immigration Act, they should have been admitted on the showing thus made.

U. S. v. Martin, 193 Fed. 975;

In re Saraceno, 182 Fed. 955;

U. S. v. Williams, 189 Fed. 915.

The warrant for the arrest of these Hindoos issued on the mere application that it be issued, on the ground that these Hindoos were "likely to become public charges because they were Hindoo laborers and that there exists a strong prejudice against them

in this locality". There was not attached to the application for the warrant of arrest any of these things required by Immigration Rule 22, nor of any subdivision of Rule 22, all the statements made in the application being mere conclusions of law and failing to state facts bringing these Hindoos within the excluded classes.

U. S. ex rel Haber v. Sibray, 178 Fed. 144.

Nevertheless the warrants of arrest issued, not on the ground alleged in the application for the warrant, but on an entirely different ground, not on the charge that they were likely to become public charges, but on the ground that they "were unlawfully in the United States in that at the time of their entry they were of the excluded classes, in that they were then persons likely to become public charges. It is submitted that this variance is fatal.

U. S. v. Uhl, 211 Fed. 628 (C. C. A.);

U. S. v. Sibray, 178 Fed. 150;

U. S. v. Williams, 183 Fed. 904;

Ex parte Avakian, 188 Fed. 688;

Ex parte Koerner, 176 Fed. 478;

Spring v. Morton, 182 Fed. 330;

Redfern v. Halpert, 186 Fed. 150; 108 C. C.

A. 262;

U. S. v. Tsaji Suekichi, 199 Fed. 750; 118 C.

C. A. 188.

However, the pretended hearing proceeded to the taking of testimony and at no hearing was any testimony adverse to the Hindoos taken from any witness

under oath. And, as the record shows, no evidence was adduced upon which a finding adverse to the Hindoos on any charge could be predicated, up to or about August 20, 1913. At that time appellee herein informed appellant herein that the record was closed and ready for submission to the Secretary of Labor for final determination.

Thereafter, and from or about August 20, 1913, up to or about September 25, 1913, appellee herein was represented on a tour of the State of California by W. H. Chadney, Immigrant Inspector, and H. Schmoldt, stenographer, who visited a great many cities and towns, administered oaths to and took the affidavits of and received written opinions and statements from approximately thirty persons, workingmen, union labor officers, railroad station agents, constables and small storekeepers in rural communities, all without the knowledge or any notice to these twenty-two Hindoos or their attorneys, and not in the presence of either the Hindoos or their attorneys. These ex parte affidavits, opinions and statements contained expressions of general hatred and contempt for Hindoos as a race, but nowhere was anything said about these specific twenty-two Hindoos or any of them. And in addition to these ex parte affidavits, opinions and statements about Hindoos as a race, there were also attached to the record about 1000 columns of newspaper clippings which were introduced into the record by the Asiatic Exclusion League, an organization formed, among other purposes, to prevent the

landing within the United States of any persons of Asiatic extraction, including Hindoos. These newspaper clippings were accumulated during a period of four years and were originally printed in all parts of the United States. They were editorial expressions of hatred and contempt for the Hindoos as a class, reports of misconduct of Hindoos in various localities, and general propaganda by labor unions against Asiatics, but not one word about these twenty-two Hindoos or any of them. These ex parte affidavits, statements and newspaper clippings were attached to the record on which the Secretary of Labor issued his warrant of deportation, though they were necessarily made without that safeguard these Hindoos should enjoy, that of the personal responsibility of the affiants and authors as to their truth, or the test of cross-examination as to their accuracy, considering the temptations they may be under to deceive, and their probable means of accurate information in regard to the subject matter of their statements. The statements were not made under the solemn obligation of an oath or affirmation, and were made without the liability of a criminal prosecution for perjury in case of falsehood, nor were the twenty-two Hindoos against whom this sort of matter was admitted given an opportunity to cross-examine those persons to show if they had bias in regard to the matter in dispute.

U. S. v. Sibray, 178 Fed. 144;

Ex rel Bosmy v. Williams, 185 Fed. 598;

U. S. v. Williams, 189 Fed. 915;

U. S. v. Martin, 193 Fed. 795;
 Ex parte Long Lock, 173 Fed. 208;
 U. S. ex rel Huber v. Sibray, 178 Fed. 150;
 U. S. ex rel. Falce v. Williams, 191 Fed. 1001;
 Ex parte Pouliot, 196 Fed. 437.

The administration of the oath to those affiants and witnesses in the ex parte proceedings by the Immigration Inspector is without authority in law, as the Immigration Act only authorizes officers to administer oaths in proceedings touching the right of an alien to enter the United States and not in proceedings involving the right of an alien to remain after entry or for the purpose of banishing aliens from the United States for causes arising after they have been admitted.

Hanges et al. v. Whitfield, 209 Fed. 675 (and cases cited therein).

Nowhere was it alleged or suggested that the certificates of entry issued to these twenty-two Hindoos at the Port of Manila were obtained by fraud or misrepresentation, and they should have been admitted at the Port of San Francisco without further examination if identified, and it never was questioned that these were the rightful holders of those certificates.

Lim Hop Fong v. U. S., 209 U. S. 453.

At no time since the arrest of these twenty-two Hindoos up to the present moment was the question of the financial or physical condition of these twenty-two Hindoos at the time of their entry at

Manila inquired into, nor any evidence of any kind or character taken on that point by any one. Nevertheless the Secretary of Labor issued warrants for the deportation of these twenty-two Hindoos, requiring appellee herein to deport them to India.

The Honorable Judge Dooling correctly states in his written opinion on which the petitions for the discharge of the Hindoos were denied, that:

“These cases involve the right of the individuals to land at the Port of San Francisco, having already been landed at Manila and coming thence here.”

It will be observed that the Court below finds that the individuals have “already been landed at Manila”, and nowhere is it even suggested that they were thus landed other than lawfully and in due form. As to their right to land at the Port of San Francisco after entry under the laws at another port, the constitutional guarantee of free intercourse among the states and peoples with all its privileges and immunities is invoked along with the most favored nation clause of the treaty between the United States and Great Britain.

Yick Wo v. Hopkins, 118 U. S. 356;

In re Tie Loy, 26 Fed. 611;

Hall's International Law, 4th Ed., p. 223;

Phillimore, International Law, Vol. 2, Chapter 2.

As pointed out in the opinion of the Court below, these twenty-two Hindoos “upon their arrival at

San Francisco, were arrested and, after a hearing, ordered deported as persons likely to become public charges''.

There is no provision in the immigration laws for the arrest and deportation of aliens already landed on the ground that they are likely to become public charges. That is a ground for exclusion at the time of the application of an alien for admission into the country.

Sec. 2, Immigration Act.

Between exclusion of an alien applying for admission and the expulsion of an alien after landing and being granted a certificate of lawful entry, there is a clear and broad distinction. As to public charges, persons in the position of these twenty-two Hindoos can be expelled from the country only in case they have become public charges, subsequent to entry.

Sec. 22, Immigration Act;

Rule 22, Immigration Rules.

If the public charge theory were worthy of consideration the circumstances of the cases of these twenty-two Hindoos clearly raise them out of the class, as nowhere has it even been suggested that these Hindoos, or any of them, ever was a public charge, anywhere in the world.

Rogers v. U. S., 152 Fed. 346; 81 C. C. A. 545;

U. S. v. Nakashima, 160 Fed. 842; 87 C. C. A. 646;

Looe Shee v. North, 170 Fed. 566; 95 C. C. A. 646;

Lim Jew v. U. S., 196 Fed. 736 (and cases cited).

As to the contention that these individuals were not accorded a fair hearing, it is sufficient to say that if what is contended for above and to follow in this brief is well founded, no hearing of any kind or character in San Francisco could be a fair hearing, for the reason that no person or tribunal has jurisdiction in a matter wherein a charge not within the scope of the laws is laid against these or other individuals.

In passing on the allegation of the petition that subsequent to the announcement that the taking of evidence in the cases had closed and the record made up for judgment by the Secretary of Labor, the Court below finds that ex parte affidavits were taken during a tour of the state by an Immigrant Inspector and that these were made a part of the record submitted to the Secretary of Labor. In passing on the admissibility of these ex parte affidavits, the Honorable Judge Dooling admits them and their contents, remarking that attorney for the Hindoos wrote the following letter to respondent, Samuel W. Backus:

“This is in response to your letter advising that new evidence has been taken by the government in the case of a group of Hindoos, and that we will now be permitted to inspect the same, and offer further evidence.

I thank you for the courtesy of the information.”

Attorneys for the Hindoos thereafter vigorously protested against this procedure on the ground that the affidavits referred to were taken out of the presence of the Hindoos and their attorneys. There was no opportunity to cross-examine the affiants. This is a deprivation of the right of the Hindoos which is fatal to the whole proceeding, on the authorities cited heretofore.

Such deprivation cannot be consented to under any circumstances in which the affidavits were taken without notice or opportunity to be present, even though the above referred to letter by counsel could be construed as an acquiescence in the proceeding. Such construction, it is respectfully submitted, is beyond any reasonable reading of the letter. At most it is a mere acknowledgment of the receipt of information, appended to which is the polite expression of thanks for a piece of information, in no wise giving the recipient's views of the action announced, and certainly not accepting the procedure as legal or binding or acceptable to either the writer or those persons whose rights are in jeopardy.

We concur most heartily in the expression of the Court below that the question of whether or not there was any evidence to support the findings of the Department of Immigration in this proceeding, "and its determination either way will have a wide and far-reaching effect".

We think that one phase of the matter was most plainly stated by his Honor, Judge Dooling, when he said:

“The question then presented, stripped of all its masks, is the following:

May the Department of Commerce and Labor upon a showing satisfactory to itself (and a finding not open to review) that a prejudice exists in this country against aliens of any race, and that there is no demand for the labor of such race, exclude all laborers of such race on the ground that they are, for such reasons, likely to become public charges?”

And the Court below, with expressions of regret that he should feel compelled to so answer his own question, answers it in the affirmative.

If we were to concede the point well taken with respect to aliens seeking admission under the immigration laws, we are confident that it is not applicable to domiciled aliens who are subjects of a friendly power bound to us by the terms of a treaty. And, in this respect, attention is directed to the distinction that must be drawn between the exclusion of an alien applying for admission, and the expulsion of an alien received and welcomed under the strict and proper enforcement of the immigration laws. Leaving out of consideration the possibilities of such a construction of the laws with respect to aliens applying for admission, it is submitted that if it is to be so construed with regard to domiciled aliens extraordinary possibilities are opened up, to be realized or neglected only by the whim or fancy or the activity or inactivity of the persons charged with the enforcement of the law as thus construed.

The Hindoos here involved were admitted under the laws. They came under the jurisdiction and control of the United States as soon as they received their certificates of lawful entry, and as such were guaranteed the rights, privileges and immunities of all subjects of the King of England within the United States, by virtue of our treaty with Great Britain. If the immigration officers are empowered to select these men in a group upon their arrival at the gates of a state, subsequent to their admission at a different port under the laws of the nation, and declare that there is a prejudice against their kind of people and that, therefore, their kind of people are likely to become public charges, and, irrespective of the circumstances of each individual case, brand each of the group as of the class and thereupon expel them, the same course may be pursued with respect to any peoples of foreign birth, without regard to justice or equity. It is equally applicable to every other race, as the Court below declares in its written opinion. And further, the Honorable Judge Dooling points out the finding of the Secretary of Labor

“is based upon conditions existing in this country, rather than upon any physical or mental defect in the individual petitioners. For a strong man unable to obtain an opportunity to labor is just as helpless as a weak one unable to perform such labor if the opportunity were afforded him.”

This means that if twenty-two coal miners from Newcastle were to be admitted at the Port of New York under the proper administration of the im-

migration laws and were to go to the coal fields of Pennsylvania, they would remain undisturbed so long as they remained in the coal fields as miners, but, if they were to depart from New York and sail to the Port of New Orleans, they could be expelled from the United States on the same reasoning, that is to say: Being strong men removing themselves from the field of their regular occupation, they could be expelled on the theory that their inexperience in the industries of the south and a preference among southern employers for negro or child labor, would lessen their opportunities or prospects for obtaining profitable employment, and thus they could be expelled from the United States and by warrant of deportation returned to the Port of Liverpool, irrespective of their financial or physical condition, either at the time of entry at New York or arrival at New Orleans, and under the circumstances of the case at bar, the miners could be thus driven from the country in spite of offers by employers to engage at good wages those particular coal miners and other coal miners to a number exceeding five times the number ordered deported.

It is respectfully submitted that such is not the law. Here is discrimination against an arbitrarily created class of persons who are subjects of a friendly power.

And as the Court below pointed out:

“But let there be no delusion that this power, once conceded, can be used only in the case of Hindoos. It is equally applicable to every other

race. Conceding the power to the Department of Labor to exclude the Hindoo laborer for this reason, we must concede to it the power to exclude, for the same reason, the laborer of any other race. It is a vast power, and one which, upon the argument of this case, I was very unwilling to believe was lodged in any executive department of the government.

“In the present cases, therefore, the Department, having the right to determine the fact as to whether these petitioners are persons likely to become public charges, has determined that they are. The fact that this determination is based upon conditions existing in this country, rather than upon any particular physical or mental defect in the individual petitioners, does not in my judgment make such determination any the less final, or render it any more open to review by the courts. For a strong man unable to obtain an opportunity to labor is just as helpless as a weak one unable to perform such labor if the opportunity were afforded him. For these reasons the order of deportation cannot be disturbed because of failure of proof. There is left then to be considered only the third contention of petitioners, that having been permitted to land at the Port of Manila, they are entitled to come to the mainland without further question.

“The statute provides that the Commissioner General of Immigration shall have charge of the administration of all laws relating to the immigration of aliens into the United States, and shall establish such rules and regulations, not inconsistent with law, as he shall deem best calculated for carrying out the provisions of the Immigration Act. At the time that some of these petitioners landed in the Philippines, Rule 14 of the Immigration Rules was as follows in so far as applicable here:

“ ‘Sec. 1. Aliens arriving in the Philippines bound for the continent shall be inspected and given a certificate signed by the insular collector of customs at Manila showing the fact and date of landing.

“ ‘Sec. 2. Aliens who, having been manifested bona fide to the Philippines and having resided there for a time, signify to the insular collector of customs at Manila an intention to go to the continent shall be furnished such certificate, as evidence of their regular entry at an insular port.

“ ‘Sec. 3. Aliens applying at continental ports and surrendering the certificate above described shall, upon identification, be admitted without further examination.’

“On June 16th, 1913, however, the foregoing rule was amended to read as follows:

“ ‘Sec. 3. Aliens applying at continental ports and surrendering the certificate above described shall, upon identification, be permitted to land, provided it appears that at the time such aliens were admitted to the Philippines they were not members of the excluded classes, or likely to become public charges if they proceeded thence to the mainland.’

“Some of the petitioners here landed at Manila on June 20th, 1913, after the foregoing amendment was in force. But whether they landed at Manila before or after the amendment does not seem to me to be at all material, as the amendment was in force for some time before any of them left the Philippines for the mainland. It is urged that this amendment is beyond the power of the department to enact, and that an alien once landed in any territory, or other place subject to the jurisdiction of the United States, may freely go thence to any portion of the United States whether it be the mainland or any of its island possessions. With this conclusion I am unable to agree.

“There may be reasons for rejecting an alien at continental ports which would not exist if he were applying to enter the Philippines. Labor and climatic conditions, and standards of living are so diverse, that one going to the Philippines who would not there be likely to become a public charge, might well be likely to become such if he proceeded thence to the mainland. A more rigid test may, therefore, well be applied to those seeking admission to the mainland than that applied to those seeking admission to the Philippines. And as the amendment to the Immigration Rules providing that the possession of a certificate of lawful entry into the Philippines should not be conclusive as to the holder's right to enter a continental port was in effect at the time that all of these petitioners sailed from Manila, the question was properly open for investigation by the immigration officers here as to whether or no at the time these aliens were admitted to the Philippines, they were likely to become public charges if they proceeded thence to the mainland. This question was investigated upon their arrival here, and was decided adversely to the petitioners.”

Nowhere does the Immigration Act, so far as appellant is able to discover, nor the constructions given it in the adjudicated cases, contemplate conditions existing in a community and totally foreign to the health, wealth, thrift, ability, character or enterprise of a domiciled alien as grounds contemplated for the expulsion of an admitted alien resident from the United States because he moves from one part of the jurisdiction of the nation to another part of that same jurisdiction.

It is conceded that the Commissioner General of Immigration has power to make rules and regulations, not inconsistent with law, but it is respectfully submitted that making rules, or amending rules designed to regulate the admission of aliens into the United States is entirely different from making rules or amendments restricting resident aliens bearing certificates of lawful entry, in the exercise of the constitutional right of free intercourse within the jurisdiction of the United States. The changing of the rule after the lawful admission of the aliens into the United States alters the procedure upon which they were entitled to rely during their residence under our laws. This amounts to an unwarranted alteration of the legal rules of evidence, requiring different evidence than the law required when the aliens were admitted.

Calder v. Bull, 2 Dall. 328.

And is a change in the law which, assuming to regulate privileges, in effect imposes the deprivation of a privilege which, when acted upon, was guaranteed by departmental regulation.

Departmental rules have the force and effect of law only when not inconsistent with the acts which they are intended to enforce, or with the constitution or existing treaties.

Ex parte Chow Chok, 161 Fed. 627.

It would seem to follow, therefore, that an alien who has entered and become a resident of any of the extra-continental possessions of the United

States would not be subject on a visit to the United States to the payment of the head tax here, irrespective of whether or not he had paid the head tax required by the jurisdiction in which he is connected, citizens of the Philippines have been held not to be subject to the payment of the tax provided by the Act of March 3, 1903.

Opinion Atty. General 131, 1904.

Until Congress legislates on the matter or laws in effect are possible of such construction as granting the power, the Secretary of Labor has no power to make rules restricting the intercourse of persons between different parts of the United States. It is an executive effort to regulate commerce between the several states and territories.

Beyond doubt these words (privileges and immunities) are words of very comprehensive meaning; but it will be sufficient to say that the clause plainly and unmistakably secures and protects the rights of a citizen of one state to pass into another state of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation, to acquire personal property, to take and hold real estate, etc.

The right to labor in any honest, necessary, and in itself harmless calling, where it can be the most conveniently, advantageously, and profitably carried on without injury to others, is one of the highest privileges and immunities secured by the

constitution to every American citizen, and to every person residing within its protection.

In re Tie Loy, 26 Fed. 611;

Yick Wo v. Hopkins, 118 U. S. 356.

The right of domiciled aliens to retain their domicile is, under the universally recognized rule of international law, the necessary consequence of having been allowed by this Government to acquire it. And it would seem that had Congress, in the just exercise of its sovereign power, seen fit to revoke that right by municipal legislation, it would have done so in an unmistakable manner.

The validity of departmental rules issued under the authority of the Secretary of Labor, and previously of the Secretary of the Treasury and the Secretary of Commerce and Labor, has been passed upon frequently by the courts. *They have the force and effect of law when not inconsistent with the provisions of the Acts themselves, or of the Constitution of the United States*, or the treaties of this country with foreign powers, and are binding in the courts.

Ex parte Chow Chok, 161 Fed. 627;

Fok Young Yo v. U. S., 185 U. S. 296; 46 Law Ed. 917.

In the ordinary run of cases a favorable decision of the Immigration Officer at the port granting the alien leave to enter the United States is the last step to be taken by the alien in connection with the establishment of his admissibility.

“The power to exclude or expel aliens, being a power affecting international relations, is vested in the political departments of the government, and *is to be regulated by treaties or by acts of congress*, and to be executed by the *executive authority according to the regulations so established* * * * so far.”

Yong Yue Tong v. U. S., 149 U. S. 698; 37 Law Ed. 905.

Any alien permitted to enter a foreign country may claim as of right the privilege conferred by the municipal laws thereof; in other words, the constitutional provisions and statutory enactments in force therein. This principle applies to its full extent only in cases where the alien has actually lawfully entered and settled in the country for the purpose of establishing his domicile therein, provided, furthermore, that he does not belong to or become a member of a class subject to the deportation proceedings either through his own act or by any act of its national legislature.

Hall's International Law, 4th Ed., p. 223.

“No country has a right to set, as it were, a snare for foreigners; therefore, conditions hostile to their interests or different from general usage must be specifically defined.”

Sir Robert Phillimore, International Law, Vol. 2, Chap. 2.

Vattal expresses the same idea in stating the principle that

“The sovereign must not permit access to his territory for the purpose of luring foreigners into a trap.”

Hence the principle that the right of expulsion, if exercised at all against aliens who come to a country having good reason to believe that, as to them, the ordinary procedure in any given case, sanctioned by civilized countries of the world, would be observed, *must not be arbitrarily exercised*.

“Expulsion is legitimate only so far as it is demonstrated with evidence that the presence of those whom it affects imperils the peace within or without the security of the governors or the governed; that, in a word, it compromises one of the interests which the state guards. *It is necessary that the danger be certain*, that the menace be effective; the administration should not recur to this harsh measure except so far as the condition of the individuals who are the objects of it *inspires real and well-founded disquietude*, either in the inhabitants of the country or in the government itself, or, perhaps, even in a friendly government. *The universal conscience protests against the arbitrary use of the right of expulsion.*”

Pradier Tode, ‘re’, Traite de droit international public par. 1857 and quoted by Mr. Sherman, Secretary of State, to Mr. Powell, minister to Hayti, No. 94, Jan, 8th, 1898, M. S. Institute of Hayti, III, 622, cited in Moore Internat. Law Dig., Vol. IV, page 91.

The conclusion to be drawn from the authorities is that, while a sovereign state has an absolute right to exclude or expel any or all foreigners from its jurisdiction either in time of peace or war, a nation which exercises either right in an *arbitrary or un-*

just manner may render itself thereby liable to a demand for satisfaction on the part of the state whose national has been thus expelled or excluded.

As was said by Chief Justice Fuller:

“In fact the only *limitation upon municipal legislation* affecting aliens may be said to consist in that *it must not be arbitrary or purely capricious* in nature, or directed towards him or those in a similar situation merely because they happen to belong to a particular nation.”

Lau Ow Bew v. U. S., 144 U. S. 47; 36 Law. Ed. 340.

At the risk of criticism for submitting so voluminous a brief, appellant is nevertheless constrained to continue because of the vast importance of the questions involved.

Appellee herein made return to the order of the Court below to show cause why the writ of habeas corpus should not issue, and in that return we find the inspiration and the motive of the warrant for the deportation of these twenty-two Hindoos. And the return imports verity unless impeached.

Crowley v. Christensen, 137 U. S. 86;
Ex parte Cuddy, 131 U. S. 280.

That return contains the following statement concerning the ex parte affidavits above referred to as grounds for expulsion of these twenty-two Hindoos:

“Respondent alleges further that affidavits of state and county officials throughout the State of California were made opposing the admission of Hindoos into the United States. The names and respective offices of some of such affiants are as follows:

Paul Sharrenberg, Secretary-Treasurer California State Federation of Labor.

John P. McLaughlin, Commissioner of Labor for the State of California.

F. E. Sullivan, General Manager Spreckels Sugar Co.

H. E. Davis, Under-Sheriff Monterey Co., Cal.

T. J. Vitaich, Business Agent, San Joaquin County Central Labor Council.

Frank B. Braire, Chief of Police, Stockton, Cal.

Wm. Johnson, Chief of Police, Sacramento, Cal.

Eugene S. Wachhorst, District Attorney, Sacramento, Cal.

George E. Gee, Secretary Yuba County Trades Council.

J. P. Onstott, Farmer, Yuba City, Cal.

Charles J. McCoy, Chief of Police, Marysville, Cal.

P. Brannan, Special Officer, Marysville, Cal.

Harry E. Hyde, Mayor, Marysville, Cal.

J. V. Parks, Justice of the Peace, Oroville, Cal.

Wm. Lewis Kurran, Marshal, Oroville, Cal.

James J. Wood, Theatre Manager, Chico, Cal.

C. E. Daly, Merchant, Chico, Cal.

H. Moir, Postmaster, Chico, Cal.

F. J. Nottelmann, Merchant, Chico, Cal.

J. N. Kelly, Merchant, Chico, Cal.

M. G. Polk, County Surveyor, Butte Co., Cal.

Lon Bond, Attorney, Chico, Cal.

J. L. Barnes, Justice of the Peace, Chico, Cal.

M. H. Goe, Marshal, Chico, Cal.

Wm. Robbie, Mayor, Chico, Cal.

E. C. Hamilton, Manager Sacramento Valley Sugar Co.

Geo. A. Dean, Secretary San Joaquin County Central Labor Council.

H. Hamer, Immigrant Inspector, Bellingham, Wash.

“The consensus of opinion as set forth by these affidavits which are appended to the petition as exhibits, is to the effect that the Hindoo is an undesirable citizen; that he is filthy, insanitary, immoral, gives the officials continuous trouble by becoming intoxicated and subject to arrest; that he is a disagreeable member of every community because of his uncleanness and offensive odor; that he becomes a public nuisance in crowding the sidewalks, street corners, postoffices and other public buildings; that merchants, theatrical managers and business men generally exclude him from their places of business; that the Hindoo is unreliable; that he is a petty thief, nomadic in his habits, will not remain employed in any particular work unless under a strict contract; that his standard of living is of the very lowest, and that he does not rear families or permanently establish himself in the country in which he works; that he is a degenerate physically, and generally in a weak and enervated condition, and invariably afflicted with the disease of hookworm; that the Hindoo belongs to the laboring class; that demand for Hindoo labor is very limited, and if desired at all is only for transient periods, and because of the strong prejudice against him, and the fact that he is continually a public nuisance and a burden to all society, it is deemed by all the affiants above named that he is likely to become a public charge, and that he should be expelled from the country.

“Respondent denies * * * that the affidavits are merely an expression of passion and prejudice culled from persons in various parts of the State of California, but that the affidavits were bona fide expressions of opinion of white merchants and officials in possession of experience and influence, and having come in direct contact with Hindoo laborers.”

There was no impeachment of this return, but amendments were made for the reason that the matters set forth in the return were described by the Court below as showing the creation of a class by the Immigration Department and the placing within the class thus created these individual twenty-two Hindoos. It was pointed out to respondent that should the allegations of the return be true with respect to Hindoos resident within California prior to the coming of these twenty-two Hindoos, the laws provided the means of dealing with those guilty of the offenses alleged, and that allegations against other Hindoos could not be used against the persons whose right to remain in the United States was involved in this proceeding.

It is respectfully submitted that the Immigration Act names all the classes of persons who may be excluded or expelled from the United States upon application for entry and upon proof of offenses against the laws. Nowhere is provision made for the executive exercising legislative power to declare that any set or class of persons is undesirable and by mere arbitrary action placing particular persons in that class that the executive declares undesirable and, thereby laying foundation for the expulsion of those particular persons, to be acted upon as ground for deportation.

That is what is being attempted here. It amounts, in effect, to arbitrarily creating a class and then discriminating against that class on the mere ground of prejudice entertained by union labor leaders and

the members of that organization known as *The Asiatic Exclusion League*.

Respondent relied in the Court below on the case of ex parte Moola Singh and 72 other Hindoos, 207 Fed. 780. But the attention of this Court is called to the fact that in that case all the aliens were without the certificate of lawful entry and the certificate entitling them to admission at a mainland port without further examination, which fact clearly distinguishes that case from this one.

Dated, San Francisco,

October 7, 1914.

Respectfully submitted,

JOHN L. McNAB,

TIMOTHY HEALY,

Attorneys for Appellant.

No. 2436.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

TIMOTHY HEALY for and on behalf of
RHAGAT SINGH et al. and SUNDAR or
SANDU SINGH et al.,

Appellant,

VS.

SAMUEL W. BACKUS as Commissioner of
Immigration at the Port of San Fran-
cisco, for the United States Govern-
ment,

Appellee.

REPLY BRIEF OF APPELLEE

JOHN W. PRESTON,

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Attorneys for Appellee.

Filed this.....day of June, A. D. 1914.

F. D. MONCKTON, Clerk.

By....., Deputy Clerk.

NOV 9 1914

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REPLY BRIEF OF APPELLEE.

This case involves petitions of twenty-two alien Hindoos for a writ of *habeas corpus*. It appears from the immigration records and their testimony that they originally came from India and that some of them were employed for a period in China before going to the Philippine Islands. On entering the island territory of the United States they were given certificates of admission by the officials who supervise immigration under the Department of War in that territory. They all remained in the Philippine Islands for periods varying from several weeks to several months when they took passage for San Fran-

cisco. At this port they were duly arrested upon warrants issued by the Secretary of Labor at Washington, D. C., and charged with being aliens unlawfully in the United States in that they were persons likely to become public charges. After many hearings before the Immigration Department during several months' time they were finally ordered deported by the Secretary of Labor. These departmental warrants dated October 10th, 1913, under which these aliens have been ordered deported, set forth that the aliens have been given hearings and that they have been found in the United States in violation of the Immigration Act "for the following, among other reasons, that "the said aliens are members of the excluded classes "in that they were likely to become public charges "at the time of their entry into the United States". Their joint petitions for writs of *habeas corpus* to the District Court were denied. (209 Fed. 700.) From the order denying the petition the appellants bring the case to this court.

The charges set forth in these warrants are based upon sections 2, 20 and 21 of the Act of February 20th, 1907. That portion of section 2 applying to this case reads as follows:

"That the following classes of aliens shall be excluded from admission into the United States
 * * * persons likely to become a public charge."

The portion of section 20 which interprets and incorporates section 2 reads as follows:

"That any alien who shall enter the United

States in violation of law * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported to the country whence he came at any time within three years after date of his entry into the United States."

That portion of section 21 which applies to these cases reads:

"That in case the Secretary of Labor shall be satisfied that an alien has been found in the United States *in violation of this Act*, or that an alien is subject to deportation under the provisions of this Act *or any law of the United States*, he shall cause such alien within the period of three years after landing or entry therein, to be taken into custody and returned to the country whence he came. * * *"

The procedure followed in these cases finds its basis in rule 14 of the immigration rules of the Department of Labor, which reads as follows:

"RULE 14. ALIENS REACHING CONTINENTAL PORTS VIA PORTO RICO, HAWAII, OR THE PHILIPPINES.

"Subdivision 1. EXAMINATION AT INSULAR PORTS. Aliens arriving in Porto Rico, Hawaii, or the Philippines, bound for the continent, shall be inspected and given a certificate signed by the immigration officer in charge at San Juan or Honolulu, or the insular collector of customs at Manila, showing fact and date of landing.

"Subd 2. CERTIFICATES FOR ALIEN INSULAR RESIDENTS. Aliens who, having been manifested *bona fide* to Porto Rico, Hawaii, or the Philippines, and having resided there for a time, signify to the immigration officer in charge at San Juan or Honolulu, or the insular collector of customs at Manila, an intention to go to the continent, shall be furnished such certificate, as evidence of their entry at an insular port.

"Subd. 3. ADMISSION AT CONTINENTAL PORTS OF ALIENS PRESENTING CERTIFICATES. Aliens applying at continental ports and surrendering the certificate above described shall, upon identification (and payment of head-tax, if from Porto Rico or Hawaii), be permitted to land, provided it appears that at the time such aliens were admitted to Porto Rico, Hawaii, or the Philippines they were not members of the excluded classes or likely to become public charges if they proceeded thence to the mainland.

"Subd. 4. ARREST AND DEPORTATION. If such aliens fail to present the certificate, it shall be presumed that they were not examined when entering Porto Rico, Hawaii, or the Philippines, and they shall be arrested in accordance with rule 22 on the ground of entry without inspection and such other grounds, if any, as may be found to exist. *If it is found in accordance with subdivision 3 hereof that such aliens were at the time of entry to Porto Rico, Hawaii, or the Philippines members of the excluded classes or likely to become public charges if they proceeded thence to the mainland, they shall be arrested in accordance with rule 22 on either or both of these grounds.*"

This rule is based upon the fact that the standard of living in the Philippine Islands is so different to the standard of living in the mainland of the United States, that people who might be admitted in the Philippines would be deemed likely to become public charges should they go to the mainland and is for the purpose of preventing aliens from using the Philippine Islands as a stepping stone to admission into the United States.

The rule is really superfluous, for even though aliens may be admitted directly into the United States,

they are in reality only admitted and allowed to enter on probation, and are subject to the right and power of the Secretary of Labor to arrest and expel them if subsequently he becomes satisfied that their presence in the country is contrary to law, or that they are likely to become public charges.

II.

Term "Likely to Become a Public Charge" Defined.

Aliens likely to become public charges are named in section 2 along with the other classes of the insane, the criminal and various others, as being excludable from the United States, and sections 20 and 21 of the Act are shown to incorporate section 2. Those likely to become public charges are not in any way distinguished from the insane, the criminal or the other classes, and the term "likely to become a public charge" has been interpreted to mean not that a person must be a public charge at the time of entry, or likely to become a public charge immediately thereafter, but if there is any possibility that the alien is *ever likely* to become a public charge—if in one year, or in twenty years—he may be excluded from the United States.

There are two interpretations that may be put upon the term "likely to become a public charge", namely, a narrow, restricted interpretation, and a broad and reasonable interpretation.

The narrow meaning of the term would signify that the person was likely to become an object of charity, to receive bounty from the City, County or State, or

might be maintained in a home or asylum provided by the community.

In the broad sense, the term might mean a person who would be a nuisance to a community, who might commit depredations and be a frequent burden, or he might be a person who would be subject to arrest, or one who would be continually under the surveillance of the law. If a person is a nuisance, a burden or a tax on any locality, he is in the broad sense a public charge. In the case of

United States vs. Williams, 175 Fed. 274,

it is shown that such a broad construction of the term "likely to become a public charge" can, and must be used.

III.

Affidavits Set Forth in the Records.

In the records in the cases of these twenty-two aliens there are on file a number of affidavits. Those on behalf of the aliens were filed by their attorneys to substantiate the contention that each one of the twenty-two aliens could secure employment in this state and that his labor was desired. The immigration authorities then filed affidavits in rebuttal of the statements made in the affidavits filed on behalf of the aliens, showing that these twenty-two aliens were not desired in the fields of employment which they expected to enter. These affidavits in the records are a mere circumstance showing the condition of affairs in the fields of labor in this country,

and the affidavits filed by the government were not used against the aliens in deciding as to their likelihood of securing employment in the country, but merely in refutation of the extravagant statements made in the affidavits filed on behalf of the aliens.

There is no attempt on the part of the government to rule against these aliens as a class, or because of their coming from a particular country, but the affidavits merely show the limited field of labor for aliens of the class to which these twenty-two belong, or any other aliens of whatsoever nationality, who might come in under similar circumstances.

IV.

Issues Raised by Petitions and Returns.

The brief of the attorneys for the aliens may be subdivided into three general divisions or issues:

A. THE FAIRNESS OF THE HEARINGS.

B. THE EVIDENCE PRESENTED.

C. THE INTERPRETATION OF THE IMMIGRATION LAWS IN THE EXPULSION OF ALIENS.

The fairness of the hearings involves the matters of procedure. It deals with the question of whether or not the aliens were advised of their right of counsel and whether they were given the assistance of counsel and also the further question of whether the hearings were entirely regular.

The discussion of the evidence presented has reference to the question whether or not there was some evidence, how such evidence was treated, and was there

an abuse of discretion in making the rulings and decisions upon the evidence presented?

The interpretation of the immigration laws concerns the application of such laws to the *expulsion* of aliens once landed on American soil. It further renders it necessary to determine whether or not certain sections of the immigration laws, particularly sections 2, 20 and 21, make a clear distinction between exclusion and expulsion of aliens likely to become public charges. Under this heading may also be discussed the question whether or not the promulgation of rule 14 was in excess of the authority conferred by section 22.

A.

The Fairness of the Hearings.

This phase or issue of the combined cases involves the matter of procedure or rather the adjective part of the case. Were all the proceedings regular? Were the aliens advised of their right of counsel? Did they avail themselves of counsel? Did counsel appear for them in their hearings before both the immigration officials and the Secretary of Labor? Was all the evidence offered by them accepted?

The questions can all be answered by a moment's perusal of the immigration records, which show that all matters of procedure were regular and open and entirely in conformity with rule 22-4 B of the immigration laws.

It is stated in the petitions that there was unfairness and irregularity in the reopening of the hearings

before the immigration authorities at Angel Island, after there had been some understanding that the cases were closed. This is denied by the returns of the respondent. It is shown in the returns that when the Commissioner of Immigration notified the attorneys for the aliens on the 25th of September, 1913, that the cases were still open for any additional evidence that they might care to submit, and that the government intended to put forth further evidence, there was no protest on the part of the said attorneys. In reply to this notification, Mr. John L. McNab, one of the attorneys for the aliens, sent the following letter:

"September 27, 1913.

"Hon. Samuel W. Backus,
 "United States Commissioner,
 "Angel Island, California.

"My dear Sir:

"This is in response to your letter No. 12824-18-1FHA, advising me that new evidence has been taken by the Government in the case of a group of Hindoos, and that we will now be permitted to inspect the same, and offer further evidence.

"I thank you for the courtesy of the information. Yours truly,

"JLM/KM

JOHN L. MCNAB."

This letter shows conclusively that up to that time the attorneys for the aliens had no objection to the proceedings, and considered them entirely fair and regular.

There is a further assertion in the petitions for the writs of *habeas corpus* on behalf of the said aliens, to the effect that at their respective hearings they were

not advised of their right of counsel, nor did they have counsel present or witnesses heard in their behalf.

To show that the aliens were accorded every right given them under the rules and regulations of the immigration act we would cite rule 22-4B of the Immigration Rules, and the records show that the procedure in each case was followed according to the provisions of said rule. It is the contention of the government on behalf of the respondent that no unfairness or irregularity in any of the proceedings can be shown, that everything was open and above board, and that every opportunity was accorded the aliens and their attorneys to submit all the evidence they desired. The case of *Low Wah Suey vs. Backus*, 225 U. S. 468, 56 L. Ed. 1165, shows the attitude and interpretation of the Supreme Court of the United States on these rules and a reading of that case in conjunction with the immigration record on file herein will show conclusively that these twenty-two aliens were given "fair hearings".

It is alleged on page five of appellant's brief that the fact that the warrants of deportation did not correspond to the wording of the warrants of arrest of the aliens was a point of unfairness in their hearings before the immigration officials. As to the power to present charges against aliens unlawfully within the country, rule 22 of the Immigration Rules, subdivision 1, provides that:

"Officers shall make thorough investigation of all cases where they are credibly informed or

have reason to believe that a specified alien in the United States is subject to arrest and deportation on warrant. All such cases, by whomsoever discovered, shall be reported to the immigration officer stationed nearest the place where the alien is found to be."

And section 22 of the Immigration Act in defining the powers and duties of the Commissioner-General of Immigration provides:

"That the Commissioner-General of Immigration in addition to such duties as may by law be assigned to him, shall, under the direction of the Secretary of Labor, have charge of the administration of all laws relating to the immigration of aliens into the United States, and shall have the control, direction and supervision of all officers, clerks and employees appointed thereunder."

In view of the foregoing principles of law and the statutory provisions of the Acts of Congress, it is obvious that the contention in appellant's brief, namely, the alleged illegality of the warrant of arrest, is absolutely without merit.

Were the aliens and their attorneys sufficiently apprised of what might be eventually incorporated in the decision of the Secretary of Labor?

The contention that arrested aliens must be formally advised in the warrant of arrest of each and every charge upon which a warrant of deportation is eventually based, has been raised in a number of cases, and decided favorably to the government. The case of

Ex parte Hamaguchi, 161 Fed. 185, at p. 192,

lays down the rule that the warrant of arrest need

not set forth specifically the charge upon which the warrant of deportation is finally based.

“That petitioner was not specifically charged with being unlawfully within the country does not militate against the authority of the Commissioner-General to deport him, finding that he was in fact unlawfully therein. Nor has the petitioner been deprived of a hearing with reference to that charge. Neither was he misled to his injury by the actual charge preferred. The petitioner was represented by counsel, and all the facts were developed at the hearing, and came from witness’ own mouth, warranting his deportation. *The summary proceeding provided by law does not require that technical regard for forms that is deemed essential in criminal proceedings*, and, having had a full hearing, whereat it was developed that he is unlawfully within the country, and the finding and recommendation of the inspector in charge being against him, I am not disposed to require that the procedure be gone through with again for the sake of stricter observance of form; the law having been observed in substance. It would be better in all such cases that the party be charged with being unlawfully within the country, specifying in what particulars the unlawfulness consists; but where a full and fair hearing has been had involving that charge, I think it would be extremely technical to hold that deportation should not follow until a further hearing be given.”

The case of *United States vs. Williams*, 175 Fed. 274-6, is in accord with the foregoing opinion:

“It is true that the warrant did not specify this ground of deportation; but the relator was advised at the outset of the hearing that the authorities meant to rely upon it as a ground of deportation and I find no requirement, either in

the act or in the promulgated regulations, that the warrant must state the alleged grounds."

The case of *United States ex rel. Rose vs. Williams*, 200 Fed. 538, at p. 541, also decides this point:

"It is true upon these assumptions that the allegations in the order of arrest that the relator had then admitted his guilt were unfounded. But irregularities in the order of arrest do not affect the status of an alien held upon a warrant of deportation after a fair hearing. It is even held that the fact that a warrant of deportation is based in part upon a charge not stated in the warrant of arrest is not an objection when the alien has had a fair hearing on the charge. *Siniscalchi v. Thomas*, (C. C. A.), 195 Fed. 701, and cases cited."

The case of *Ekiu vs. United States*, 142 U. S. 651, at page 662 emphatically decides this point, and cites a number of authorities:

"A writ of *habeas corpus* is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, *he is not to be discharged for defects in the original arrest or commitment. Ex parte Bollman*, 8 U. S. 4, Cranch 75, 114, 125 (2:554, 567, 570); *Coleman v. Tennessee*, 97 U. S. 509, 519 (24:1118, 1123); *United States v. McBratney*, 104 U. S. 621, 624 (26:869, 870); *Kelly v. Thomas*, 15 Cray, 192; *Rex v. Marks*, 3 East, 157; *Shuttleworth's Case*, 9 Q. B. 651."

Ex parte Garcia, 205 Fed. 53;

The Japanese Immigrant Case, 189 U. S. 187;

Low Wah Suey vs. Backus, 225 U. S. 460, 56 L. Ed. 1165;
Zakonite vs. Wolf, 226 U. S. 272, 57 L. Ed. 219.

On page 7 of appellant's brief it is alleged as a point of unfairness that certain *ex parte* affidavits were filed by the government without giving counsel for aliens an opportunity to cross-examine the persons making the statements. The government contends that while many privileges are accorded to aliens in their immigration proceedings the privilege of cross-examining the affiants making affidavits is not granted to aliens by immigration rules and regulations. The case of *Hanges vs. Whitfield*, 209 Fed. 675, referred to by appellant is now on appeal. Without further comment appellee cites the following cases on the point of cross-examination:

Ex parte Pouliot, 196 Fed. 437;
Ex parte Cardonnell, 197 Fed. 774;
Siniscalchi vs. Thomas, 195 Fed. 701;
Ex parte Garcia, 205 Fed. 53;
The Japanese Immigrant Case, 189 U. S. 86, 100;
Low Wah Suey vs. Backus, 225 U. S. 460, 56 L. Ed. 1165.

Rule on the Question of Unfairness.

The long-established rule by the many court decisions is to the effect that if the hearings before the immigration officials have been regular and have followed the provisions of the Immigration Act, and no unfairness can be shown, the merits of the cases will not be entered into when such cases are presented to the courts. Where no irregularity can

be shown, it is the rule of the courts that the determination of executive officials in the course of their departmental duties shall be final and conclusive and the courts will not reopen a case to delve into its merits. Authorities for this rule may be cited as follows:

Bouve, *Exclusion and Expulsion of Aliens in the United States*, pp. 135, 137;
Ekiu vs. U. S., 142 U. S. 651;
Fong Youe Ting vs. U. S., 149 U. S. 698;
Lem Moon Sing vs. U. S., 158 U. S. 538;
Tan Tung vs. Edsell, 223 U. S. 673;
Low Wah Suey vs. Backus, 225 U. S. 460;
Ex parte Moola Singh, 207 Fed. 708;
Chin Yow vs. U. S., 208 U. S. 8;
Ju Toy vs. U. S., 198 U. S. 253.

The Supreme Court in the California case, *Low Wah Suey vs. Backus*, 225 U. S. 460, discusses the question of unfairness and cites many authorities on that point. In his decision, Justice Day said:

"A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were *manifestly unfair*, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final. *United States v. Ju Toy*, 198 U. S. 253, 49 L. Ed. 1040, 25 Sup. Ct. Rep. 644; *Chin Yow v. U. S.*, 208 U. S. 8, 52 L. Ed. 369, 28 Sup. Ct. Rep. 201; *Tang Tun v. Edsell*, 223 U. S. 673, ante, 606, 32 Sup. Ct. Rep. 359."

In the case of *Chin Yow vs. United States*, 208 U. S. 8, Justice Holmes has very emphatically given his opinion on the question of the fairness and regularity of an immigration hearing. He says:

“If the petitioner was not *denied a fair opportunity to produce the evidence* that he desired, or a fair, though summary hearing, the case can proceed no farther. Those facts are the foundation of the jurisdiction of the District Court. If it has any jurisdiction at all, *it must not be supposed that the mere allegation of the facts opens the merits of the case* whether those facts are proved or not. * * * But unless and until it is proved to the satisfaction of the judge that a hearing properly so called, was denied, the merits of the case are not opened and we may add, *the denial of the hearing cannot be established by proving the decision was wrong.*”

The question of whether or not Justice Holmes in his opinion in the Chin Yow case is consistent with his former opinion in the case of *United States vs. Ju Toy, supra*, has been carefully analyzed and it is shown that they are in harmony. An emphatic interpretation of these two cases, and entirely agreeing with them, is the opinion in the case of *Ex parte Chin Hen Lock*, 174 Fed. 282, 286-7, in which the Court said:

“It is not the province of the district judge *to try the facts* upon which a Chinese immigrant claims the right to enter the United States. Congress has provided that all these facts are to be heard by the appropriate immigration officer. * * * It has been held by the Supreme Court that a hearing by that tribunal is due process of

law. *United States v. Ju Toy*, 198 U. S. 253.

* * *

"Some of the judges of the Circuit Court of Appeals have stated that this decision has been somewhat modified by the *Chin Yow* case, 208 U. S. 8. * * * I do not so understand it. The *Chin Yow* case simply holds that where an applicant claiming to be an American citizen by birth has had no trial, or the hearing before the inspector gave the applicant no 'chance to establish his right' in the mode provided by the statutes, or his hearing was not conducted 'in good faith', however 'summary', it is the duty of the courts to take jurisdiction; otherwise not.

* * *

"The opinion in this case is entirely consistent with that in the *Ju Toy* case. * * * Applying the principle that the district judges are not to interfere with the conduct of the immigration officer or the Honorable Secretary of Commerce and Labor in the performance of their statutory duty, where they have given the applicant a fair hearing, *however they may have weighed and decided the facts*, if they have acted in good faith, the judges should keep their hands off."

In the following and numerous other cases the principle announced by the Supreme Court has been applied in slightly varying, but always broad, terms:

Ex parte Watchorn, (C. C., S. D. of N. Y.),
160 Fed. 1014, 1016.

"Doubtless the determination of the immigration authorities upon all questions of fact, *even if made upon legally incompetent or inconclusive evidence*, is final, but when the proceedings before them show indisputably that they are acting *without jurisdiction*, relief may be had by writ of *habeas corpus*."

Ex parte Petterson, (C. C. D. of Minn.), 166 Fed. 536, 539.

"That a writ of *habeas corpus* may be properly granted when the evidence produced before such (immigration) official, and upon which he assumes to act is wholly *uncontradicted*, and shows *beyond any room for dispute or doubt* that the case in any view is beyond the statute. * * *

In re Tang Tung, (C. C. A., 9th Cir.), 168 Fed. 488, 496. (See, also, 490-491.)

"That, after examining the record and finding that a *bona fide* hearing had been granted, 'under such circumstances we do not understand * * * that any court is authorized to review the action of the Department of Commerce and Labor in the matter of *admitting or weighing evidence, or to consider whether the conclusions drawn by its officials were right or wrong.*'"

Ex parte Long Lock, (D. C. N. D. of N. Y.), 173 Fed. 208, 215.

"This court can only examine the evidence to see (1) was a full and fair and unbiased hearing had? and (2) was the decision based on such a state of facts that a question of fact was presented for the decision of the inspector? or (3) *was the evidence conclusive as a matter of law*, so that the decision, affirmed by the Department of Commerce and Labor, was arbitrary and unwarranted?" (See, also, *Ex parte Lee Kow*, [C. C. N. D. of N. Y., same judge, 161 Fed. 593, 595].)

Davies vs. Manolis, (C. C. A., 7th Cir.), 179 Fed. 818, 821.

"In each instance the 'questions of fact are for the consideration and judgment of the department officials. * * * (See, also, p. 822.)"

In re Jem Yuen, (C. C. D. of Mass.), 188 Fed. 350.

“It is well settled that officers of the government to whom the determination of questions of this kind are entrusted * * * are not bound * * * by rules of evidence applied in courts. * * * The alien’s opportunity to be heard need not be upon any regular set occasion nor according to the forms of judicial procedure; it may be such as will secure the prompt, vigorous action contemplated by Congress and appropriate to the nature of the case.”

While this cause was pending before Judge Dooling a similar case came up before District Judge Neterer of the Western District of Washington, in the matter of the detention of seventy-two alien Hindoos, entitled *Ex parte Moola Singh*, 207 Fed. 708. It is earnestly requested that this opinion be read with that of Judge Dooling. That portion of the opinion rendered by Judge Neterer which is directly in point, is as follows:

“The admission of aliens into the United States is regulated by Congress. The supervision is confided to the Department of Immigration charged with the enforcement of laws regulating the admission. The final determination of all of the facts with relation to the qualification of aliens to enter the United States or their deportation within the time limit fixed by Act of Congress for reasons therein given is entrusted to the proper immigration officers ‘whose decision is final, unless reversed on appeal to the Secretary of Labor.’ By the Act of Congress these officers are made the sole and exclusive judges of the existence of the facts establishing qualification, and no other tribunal is vested with

authority or power by Congress to re-examine and consider the sufficiency of the evidence on which these officers acted. So long as the officers clothed with this authority act within the limits placed by Congress, courts have no right to interfere. The authority of the immigration officers and the jurisdiction of the courts depend upon power conferred by Congress. It is a matter of legislation. No discretion is vested in the courts. Congress has the right to legislate upon the subject, prescribe rules and fix limits and confer authority where it deems wise in legislating upon the subject at hand. The supreme authority is conferred upon the immigration officers. The jurisdiction of the court is limited to ascertaining whether the petitioners were denied a hearing.

Ekiu vs. United States, 142 U. S. 650;
Yamataya vs. Fisher, 189 U. S. 86;
United States vs. Ju Toy, 198 U. S. 253;
Lee Moon Sing vs. United States, 158 U. S. 583;
Chin Yow vs. United States, 208 U. S. 8.

“An examination of the record which is presented upon this hearing establishes to my mind conclusively that a fair and full hearing was accorded to each and every one of the petitioners. They were represented by counsel and given every opportunity of presenting all facts bearing upon their qualification. A hearing having been accorded, the court is precluded from a re-examination of the issue presented, merely because it is contended that the conclusion of the immigration officers, based upon the testimony presented, was wrong.

Chin Yow vs. United States, supra.”

The facts in the cases decided by Judge Neterer are exactly similar to those in the cases at bar, the aliens having first landed in the Philippine Islands.

Attorneys McNab and Healy, representing the appellant, attempt on page 28 of their brief to cite a distinction in that the Hindus in *Ex parte Moola Singh, supra*, did not present certificates from the Philippine Islands upon their arrival in Seattle, Wash. That is a distinction without a difference, since the aliens claimed to have been duly admitted in the island territory, they were arraigned on warrants of arrest emanating from the Department of Labor, which is the procedure with aliens already in the United States, and were ordered expelled from the country by warrants of deportation just as in the case before this Court. To our knowledge no appeal has yet been perfected in that case.

B.

The Evidence Presented.

The rule and the precedent fixed by the authorities is to the effect that if a decision by the immigration authorities is not arbitrary and is substantiated by some evidence, such ruling of the immigration official will not be disturbed. The rule is, if there is some evidence—as one authority states, “even a scintilla of evidence”—the courts will not investigate the merits of the case. The authorities substantiating this rule are as follows:

Chin Yow vs. United States, 208 U. S. 8;
United States vs. Williams, 190 Fed. 897;
Ex parte Lee Kow, 161 Fed. 592;
Ex parte Tong Lock, 163 Fed. 208;
Tan Tung vs. Edsell, 223 U. S. 673;
Low Wah Suey vs. Backus, 225 U. S. 459.

Was There Some Evidence to Support the Decision of the Secretary of Labor?

To determine if there has been any evidence introduced as to the likelihood of each one of the respective aliens becoming a public charge, each case must be individually investigated. It is necessary that the testimony of each alien be treated separately and not in conjunction with that of his associates, as a whole. The reasons or arguments that may be deduced from the records of each of the twenty-two aliens are set forth as follows:

1. The record in the case of the said alien Bhagat Singh shows that he had moved four times within the last three years, and was then only nineteen years of age. This goes to show that he is very nomadic in his habits, that he has no trade and no training, and is not fit for anything but mere transient labor in agriculture; that he has no relatives in this country, and the fact that although he earned money during his stay in the Philippine Islands, he had less money on leaving Manila than when he went there, shows him to be shiftless. The record also shows that he has no property, that his earning capacity is very small, that he has no particular destination and has insufficient funds to maintain himself for a period pending his getting labor in some work that he might be fitted to perform. His characteristics and standard of living are such that his employment is not desired except in very limited fields. He is susceptible to disease and may have had hookworm, having come from a country where from sixty to eighty

per cent of the laboring classes are afflicted with that disease. He belongs to a class against whom a severe prejudice exists, and by reason of such enmity, coupled with his other disqualifications, his likelihood of permanent employment is very limited and would lead a reasonable person to the conclusion that he is likely to become a public charge.

2. The record in the case of the said alien, Sowan Singh, shows that he is a married man, and having served as a watchman in Hong Kong, worked for a short period as a peddler in Manila. The record does not show that he provided for his wife, and he must necessarily aid in her support as well as maintain himself in this country. His likelihood of obtaining employment as a peddler in this country is very uncertain, and is a precarious business venture because of the license demanded. He is nomadic, has no relatives in this country, and the certificate of the medical examiner of aliens shows that he is afflicted with hookworm, a dangerous contagious disease, and should he be cured of this disease, he would be, according to medical statistics, susceptible to many other dangerous and contagious diseases because of his enervated and debilitated physical condition. The record also shows that on his landing in the Philippine Islands he was compelled to put up a \$250 bond conditioned that he would not become a public charge. His qualifications and inexperience are such that his employment could only be of the very lowest type of labor. The fact that he belongs to a class against whom there exists a strong prejudice is a good and sufficient reason for

concluding that his employment would be very limited and on account of his physical debility, he is likely to become a public charge.

3. The record in the case of the said alien, Arjan Singh, shows that he is a married man, having made no provision for his wife in India, and therefore is in duty bound to provide for her support as well as make a living for himself in this country. He has been a soldier and has no particular occupation or trade. For a short time while in Manila, he did some peddling, but states that he does not desire to do any manual labor in this country. However, his qualifications show that that is the only field of labor he can go into and that he has had no experience in any kind of work. The record also shows that he is not honest in his statements, for he denied having put up a bond at the port of Manila, while his certificate shows that a bond of \$250 conditioned that he would not become a public charge, was put up for him. The medical examiner's certificate at this port shows that he is suffering with what is known as "arrhythmia, or irregular heart action, affecting his ability to earn a living". According to his own statements, he is not fitted for anything but manual labor and yet on account of his condition, such labor is impossible. This fact, coupled with the prejudice against him in this country and the undesirability of his labor, and the fact that he comes from a country from sixty to eighty per cent of the laboring classes of which is afflicted with hookworm, making it likely that he may be af-

flicted with the same disease,—all these facts go to show that he is likely to become a public charge.

4. The record in the case of the said alien, Partab Singh, shows that it was his intention to come to the United States when he left China, and that he spent only fifteen days in Manila waiting for the boat. He claims he did some peddling in Manila. The record shows that he is married, has one child and must aid in their maintenance in India as well as earn a living for himself in this country; that he has no one to help him in this country except a cousin whose address he does not know; that he does not like to work on a farm, yet he is fitted for nothing else; that he has not sufficient means to maintain himself pending his being employed in some labor; that he has money and property in Shanghai but has no documentary or other evidence to prove this assertion. The strong prejudice against this alien, coupled with his characteristics, standard of living, and other disqualifications, and the fact that he comes from a country where from sixty to eighty per cent of the laboring classes are afflicted with hookworm and other contagious diseases, are good and sufficient grounds for believing that he will not be able to get permanent employment in the United States and that he is likely to become a public charge.

5. The record in the case of the said alien, Asa Singh, shows that he has a wife and one child in India; that he left seven months ago without any provision for their maintenance and he must provide for them as well as make a living for himself in this country.

In India he was a farmer; in Hong Kong a watchman at a very small salary. He has no ability in any skilled craft and has only \$50 in his possession. His many extravagant statements of property and money in India are without corroboration. He says only as a last resort will he do manual labor, yet he has no ability in any other line. When landed in the Philippine Islands where the standards of living are much lower than in the United States, he was compelled to put up a \$250 bond providing against the likelihood of becoming a public charge. He admits that his coming to Manila was a mere subterfuge and that the landing there was only to assist his landing in the United States. His medical certificate shows that he is afflicted with hookworm, and even should he be cured, the statistics and reports of the Rockefeller Institute show that he will be in such a debilitated condition that he will be susceptible to such contagious diseases as typhoid, smallpox and tuberculosis. His inexperience, lack of training and lack of skill in any trade, coupled with his diseased, enervated and debilitated physical condition and the strong prejudice against his employment in this country, militate against his being able to secure work for any extended period and shows that he is likely to become a public charge.

6. The record in the case of the said alien, Sapuran Singh, shows that he is nomadic, having moved four times in the past few years without any particular purpose or intent in his migration. He has but \$50 in his possession and his statements show that his earning capacity is very small. His vague statements of prop-

erty in India are not substantiated by any documentary or other evidence. His only employment for a number of years has been that of a night watchman. He stated that for a few days in Manila he peddled clothes. His conduct and his statements show that his only purpose in going to Manila was to aid his landing in the United States. He is not fitted for manual labor. He is now under treatment at Angel Island for the contagious disease of hookworm. This will leave him in an enervated physical condition. The strong prejudice against his employment in this country, coupled with his physical condition, his lack of financial means and inexperience in any manual labor, shows that he is likely to become a public charge.

7. The record in the case of the said alien, Soba Singh, shows that he is very nomadic, having moved four times within two years without any definite or fixed destination; that his wife is in India and he must send her money for her support as well as maintain himself in this country; that he never worked at any hard labor for the past two years; that he has worked as a watchman and a peddler; that he has only \$50; that the past two years of inactive life have disqualified him for manual labor. The strong prejudice against him in this country and the fact that he comes from a country where from sixty to eighty per cent of the laboring classes is afflicted with hookworm, militate against him and were all taken into consideration by the immigrant inspector when he determined that this man was likely to become a public charge.

8. The record in the case of the said alien, Sham Singh, shows that he has a child in India whom he must support; that he moves whenever the wanderlust strikes him without any particular objective point; he stated that he did some peddling for a few months in Manila but that "he did not bother to look for work". He has but \$50, but makes many statements of money and real property belonging to him in India, but produces no documentary evidence to prove them. He has not sufficient means to support himself while looking for work. The fact that there is a strong prejudice against him would militate against his employment. He comes from a country where more than a majority of the laboring classes are afflicted with hookworm and other contagious diseases. His many physical disqualifications, his lack of training, his insufficient means and the uncertainty of his employment, all tend to prove that he is likely to become a public charge.

9. The record in the case of the said alien, Viryan Singh, shows that he is 36 years of age with no other occupation than that of watchman. He says he will do independent work, but has no idea what kind of work he prefers. He has no destination or objective point to which he intends to go in this country. His own statements show that he is shiftless. Even in the Philippine Islands, where the standard of living is much lower than here in the United States, he was compelled to put up a \$250 bond to provide against his becoming a public charge. The strong prejudice against him, his disqualifications, his inexperience and lack of financial means, lead to the natural conclusion

that in this country he is likely to become a public charge.

10. The record in the case of said alien, Sohn Singh, shows that he was a night watchman in China; that he went to Manila with the intent and purpose of coming on to the United States; that he was compelled to put up a \$250 bond to provide against his being likely to become a public charge; that he was told not to beg; that he might do farm work. The record also shows that at the present time he is suffering with hookworm and even should he be cured, he would be in such an enervated and weakened condition that, according to statistics, he would be susceptible to the contagious diseases consumption, typhoid and smallpox. He has only \$50 and no documentary evidence of any other property. This is insufficient to maintain him pending his finding any employment that he might be able to do. These physical disqualifications, when considered with the strong prejudice against his employment and residence in this country, are strong considerations in arriving at the conclusion that he is likely to become a public charge.

11. The record in the case of the said alien, Naron Singh, shows that he is 32 years of age; that for the past four years he has worked as a night watchman; that he has never peddled; that he stayed in Manila only two weeks. The natural inference is that he used the Philippine Islands as a stepping stone to enter the United States. He states that he intends to go into business but has only \$50. His vague and unbelievable statements of property in India cannot be

given credence. He states that he could do farm labor but even though he knows something of farm work in India, his experience would not be such as would fit him for farm work in this country. The fact that he has a wife to provide for in India makes an added burden to the maintenance of himself in this country. He is not even properly fitted for the most menial work. The strong prejudice against him in this country makes it certain that his employment will be only for temporary periods. This, together with his lack of education, and the fact that he comes from a country where from 60 to 80 per cent of the laboring classes have hookworm, leads one to the natural conclusion that he is a person who is likely to become a public charge.

12. The record in the case of Gulam Nabi shows that he is 27 years old; that he went to Manila with the intention of effecting a landing there so that he might the more easily get into the United States; that he was in the United States seven years ago. He has no substantial evidence to corroborate this statement. He says he has a wife in India and a child eight years old. He makes no mention of any particular vocation or fixed trade. He comes from a country where from sixty to eighty per cent of the people are afflicted with hookworm and many other dangerous and contagious diseases. He has only \$50 and no certainty of employment. The fact that a strong prejudice exists against him in this country, together with his many disqualifications, would lead one to believe that he is a person who is likely to become a public charge.

13. The record in the case of the said alien, Sundar Singh, shows that he left India about four years ago and since then has worked as a policeman or watchman in China; that he had a store in Shanghai; that he spent seventeen days in Manila; that he has money in Shanghai. His statements are without corroboration. The certificate of the medical examiner of aliens shows that he is afflicted with hookworm. Even should he be cured, statistics show that he would be in such an enervated and debilitated condition that he would be susceptible to other contagious diseases. The indolent and inactive life he has led for the past four years has not fitted him for any manual labor. The strong prejudice against him, his financial condition and his weakened physical condition should be strong reasons for excluding him from the United States on the ground that he is likely to become a public charge.

14. The record in the case of the said alien, Naron Singh, shows that for three years after leaving India he served as a night watchman in Shanghai; that his going to Manila was only to effect his entrance into the United States; that he has money in India. He produces no documentary or other evidence to substantiate this fact. He states that he will do work if he gets it, but is rather indifferent as to getting employment. He is absolutely unskilled in any special line of work and can only do the roughest manual labor. The fact that he comes from a country where hookworm is so prevalent makes it probable that he may become afflicted with contagious diseases. These many disqualifications, coupled with his financial ina-

bility and the strong prejudice against his employment in this country, led to the natural conclusion that at the time of his entrance in the United States he was a person who was likely to become a public charge.

15. The record in the case of the said alien, Bashan Singh, shows that he was a farmer in India and for a time served as a soldier in the British Army. For over five years he was employed as a policeman or a sort of a night watchman in Shanghai, and during the month he spent in Manila he peddled clothes but without much success. He has only \$55 in cash, but makes many uncorroborated statements of wealth which he has in hiding in Shanghai. His statement that he will do farm labor does not prove that he is capable of such work for his life as a soldier and night watchman has not fitted him for the lowest and meanest of physical labor. His disqualifications, physical and financial, coupled with the prejudice against him, would lead to the conclusion that his employment here would be very temporary and that he is such a person as is likely to become a public charge.

16. The record in the case of the said alien, Foman Singh, shows that he has been away from India for about two years, having served as a night watchman in Shanghai most of the time, and is not qualified to do any real physical labor. He claims he peddled clothes in Manila. The fact that he remained only one month in Manila shows that he was using the Philippine Islands as a stepping stone to the United States. The \$50 which he produces is of

the same amount as that of most of his associates and his statements of having more money in China cannot be given credence, according to the immigration rules, unless he has some foundation for such claims. He has no trade and has never been engaged within the last few years in any productive labor, yet he states that he could do farm work. A certificate of the medical examiner at this port shows that he is suffering from the disease of scabies and is being held for treatment. His lack of experience, his diseased body, and the prejudices against giving him employment in this country, all tend to show that at the time of his entry into the United States he was such a person who was likely to become a public charge.

17. The record in the case of the said alien, Jagat Singh, shows that for five years and three months he worked as a night watchman in Shanghai, but has never been employed in any trade or work of a skilled artisan. The fact that he was only 15 days in the Philippines shows that he was there merely for the purpose of effecting a landing in the United States. He produces \$155, but does not make the statements of his associates of the untold wealth that he has in India. His wife in that country must be supported, and this is a reason considered by the immigrant inspector in arriving at his conclusion. The fact that he is without any skill in any work, and his life for more than five years has been inactive, shows that he is not even physically fitted to do manual labor. The strong prejudice against giving him employment in this country, coupled with his

lack of skill and financial disability, proves conclusively that at the time of his entry into the United States he was likely to become a public charge.

18. The record in the case of the said alien, Jamit Singh, shows that he has no trade, that he cannot do farm labor. It would be a natural conclusion that a night watchman would have but a poor knowledge of farm work. He knows no skilled trade. He has but \$50 and states that he has no other possession anywhere. He is diseased, being afflicted with stomatitis. Without training, and being ill with an enervating disease, he has a poor chance for doing work in this country. This, together with the fact that there is a strong prejudice against giving him employment in this country, leads one to the natural conclusion that at the time of his entry into the United States he was a person likely to become a public charge.

19. The record in the case of the said alien, Mada Ram, shows that he stayed one month in Hong Kong and one month in Manila prior to his coming to the United States. He states that he had a shop in India and that during the time he was in Manila he did some peddling. He has \$60 and makes some very vague statements of the property he owns in India. His statements are uncorroborated. His lack of finances certainly makes it impossible for him to establish a shop in this country to compete with American shops. His lack of experience in any line of labor, and the strong prejudice against him in this

country, make it very probable that he is likely to become a public charge.

20. The record in the case of the said alien Ferroz Khan shows that he left India one year ago and spent most of the time prior to coming to the United States in Manila. He states that he was a watchman there. He claims to have been a farmer in India and that he owns property there but has absolutely no corroboration. Forty-five dollars is all he possesses and that is insufficient to sustain him until he is able to obtain employment. On his entry into the Philippines he was compelled to put up a bond of \$250 to provide against his becoming a public charge. He has no trade and no training in any line of work. The prejudice against him, his susceptibility to diseases which are very prevalent among his associates, lead to the conclusion that he is likely to become a public charge in this country.

21. The record in the case of the said alien Mahbub Ali shows that he left India about a year ago; that he is 19 years of age; that he has never done any work but has been going to school; that on arriving at Manila it was his intention to attend school there. While there he was not working at any employment that brought him any pay, but worked for his board at some livery stable. He stated that he had a certificate to admit him into the schools of this country, but when asked to produce it stated that upon presenting it to the superintendent of the schools in Manila it became lost and was not returned to him. He has only \$40 and his assertion that his father in

India will support him here is without any foundation. The medical examiner's certificate here shows that he is suffering with granular conjunctivitis which would disqualify him as a student. He has never had any experience at work and has never earned a livelihood. The discrepancy in his statement regarding his status as a student, coupled with his financial disqualifications and his physical disability, would lead one to the natural conclusion that at the time of entry into this country he was likely to become a public charge.

22. The record in the case of the said alien Abdoolah Khan shows that he is 35 years of age; that in India he was a farmer, owning the property which he worked, but makes no attempt to substantiate this with any documentary evidence. He spent about five months in Hong Kong and a short period in Manila. At neither place did he attempt to do any work. At Manila he was compelled to put up a bond providing for the possibility of becoming a public charge. He has only \$50, has no skill in any line of work and even if physically able could only do the crudest manual labor. His many disqualifications would naturally lead one to believe that at the time of his entry in this country he was a person likely to become a public charge.

The testimony of the twenty-two aliens, when viewed as a whole, shows conclusively that there was concerted action or a sort of conspiracy to evade the immigration laws by first going to the Philippine Islands, remaining there for a very limited period,

and, having acquired a residence there, then proceeding to the mainland. Although some denied that their original intention in going to Manila was to come to the mainland, nevertheless their actions belied their words. In considering their financial qualifications as a whole, it will be seen that fully seventy-five per cent had just fifty dollars in gold.

The statements of eighty per cent are to the effect that they were night watchmen in China for a number of years and then for a few days peddled goods in Manila. It seems absurd that so many night watchmen are needed in China, especially of the Hindu race. There is no means of disproving the statements of the twenty-two aliens without going to China or the Philippine Islands to get testimony in refutation. Considering their testimony as a whole, it is evident to any one perusing the same that they had carefully arranged a story or a set of statements which they believed would carry the greatest weight with the immigration officials in judging as to their right to land in the United States.

Do the Authorities on the Question of Abuse of Discretion Support the Evidence in These Cases?

The local immigration officials who saw and personally inspected the twenty-two aliens being familiar with the condition of alien Hindu laborers already in the United States were able from their accumulation of official experience and departmental knowledge to come to the conclusion whether or not these particular twenty-two aliens, each considered individually, were likely to become public charges.

In the case of *Tang Tun vs. Edsell*, 223 U. S. 672, it is stated:

"The acts of August 18, 1894, chap. 301 (28 Stat. at L. 327, 390, U. S. Comp. Stat. 1901, p. 1303) and of February 14, 1903, chap. 552 (32 Stat. at L. 825, 828, U. S. Comp. Stat. Supp. 1909, p. 87), make the decision of the appropriate immigration officer final unless reversed on appeal to the Secretary of Commerce and Labor. *And if it does not affirmatively appear that the executive officers have acted in some unlawful or improper way and abused their discretion*, their finding upon the question of citizenship must be deemed to be conclusive, and is not subject to review by the court."

Judge Dooling in his opinion in this case in the Court below, 209 Fed. 700, said:

"But let there be no delusion that this power, once conceded, can be used only in the case of Hindus. It is equally applicable to every other race. Conceding the power to the Department of Labor to exclude the Hindu laborer for this reason, *we must concede to it the power to exclude, for the same reason, the laborer of any other race.*"

That the immigration officials are not merely expelling and excluding those of only the Hindu race, but the members of any race, is most emphatically shown in the case of *White vs. Gregory*, 213 Fed. 768, Circuit Court of Appeals for Ninth Circuit, decided May 18, 1914. In that case a number of Russian aliens applied for admission to Seattle, Washington, and were denied admission on grounds that they were likely to become public charges. Upon peti-

tioning to the District Court they were discharged upon a writ of *habeas corpus*. (210 Fed. 680.) In rendering the opinion on the appeal to this Court, Judge Morrow reversed the District Court. After quoting with approval *Ekiu vs. U. S.*, 142 U. S. 651, the opinion concludes as follows:

“In the present case the executive officers found that the aliens were persons likely to become a public charge. This is a ground of exclusion provided by law. In reaching this conclusion the officers gave the aliens the hearing provided by the statute. This is as far as the court can go in examining such proceedings. It will not inquire into the sufficiency of probative facts, or consider the reasons for the conclusion reached by the officers. As said by the Supreme Court:

“‘Unless and until it is proved to the satisfaction of the judge that a hearing, properly so called, was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong.’ *Chin Yow v. United States*, 208 U. S. 8, 13, 28 Sup. Ct. 201, (52 L. Ed. 369).

“The order and judgment of the court below are reversed, with instructions to dismiss the writ of *habeas corpus*.”

The recent case of *United States vs. Uhl*, decided by the Circuit Court of Appeals, Second Circuit, May 14, 1914, 215 Fed. 573, also involves a group of aliens who were excluded from the United States on the ground that they were likely to become public charges. In that case fourteen Russian aliens applied for admission at New York City, claiming their destina-

tion as Portland, Oregon. The District Court declined to grant writs of *habeas corpus*, 211 Fed. 236, and on an appeal to the Circuit Court of Appeals this decision was sustained. In commenting on the powers of the immigration officials, Circuit Judge Coxe said:

"The board was also enabled from information derived from the press and other sources to determine the likelihood of the relators securing employment when they reached Portland and was justified in finding that conditions there were such that the chance of employment was most unlikely. It is true that information in this form would not be permitted in a court of law, but the immigration officers cannot delay these proceedings indefinitely. They cannot summon witnesses from the Pacific states or send commissions there. If they were satisfied from information received that there was no market in Portland for such services as these relators could render, they were justified in acting upon such information, just as they would be if satisfied from reports in the press or from any reliable source that Portland had been destroyed by flood or fire or that an epidemic of cholera was raging there. Congress has placed the determination of these questions in the hands of trained officials and their conclusions upon disputed questions of fact are final and conclusive. It is only in the very rare instance that a finding is without any proof to support it that the courts may interfere.

"We think these views are sustained by the following authorities: *Nishimura Ekiu v. United States*, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; *Lee Lung v. Patterson*, 186 U. S. 168, 22 Sup. Ct. 795, 46 L. Ed. 1108; *Lem Moon Sing v. U. S.*, 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082; *U. S. v. Ju Toy*, 198 U. S. 253,

25 Sup. Ct. 644, 49 L. Ed. 1040; *Low Wash Suey v. Backus*, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165.

"The order dismissing the writ is affirmed."

In *Ex parte Marshall*, 213 Fed. 123, Judge Dooling reaffirmed his opinion rendered in this case now before this Court. *Ex parte Marshall* was a hearing on seven petitions for writs of *habeas corpus* of thirty-four Hindus who applied for admission at San Francisco, having first landed in the Philippine Islands. That case is identical with the case at bar and it is cited without further comment.

United States vs. Williams, 190 Fed. 897, is a case on the question of deportation on the ground of an alien's likelihood of becoming a public charge. It is there stated:

"As to the first of these propositions, the board had before it the certificate of the examining surgeons that Thomas Buccino was undersized, and 'had varicose veins of the left leg which affects his ability to earn a living.' Moreover, the alien was present in person, and they had opportunity during the examination which they conducted to form an opinion as to his physical and mental qualifications for earning a livelihood. Ever since the decision of the Supreme Court in *Nishimura Ekiu v. United States*, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146, it has, so far as I know, been held in this circuit that if the board of inspectors had the alien before them so that they might themselves inspect and examine him, there was sufficient before them to warrant his exclusion on the ground that he was liable to become a public charge if in their discretion they reached such a conclusion."

The case of *Ex parte Lee Kow*, 161 Fed. 592, is in accord with the cases just cited:

"This court cannot grant a writ and in effect reverse and set aside the decision of the inspector and department on the ground it may think there was *sufficient evidence to warrant a decision the other way, or that there was a preponderance of evidence in favor of the petitioner*. See cases cited. When a question of fact is presented for the decision of these *quasi-judicial* officers, and that question is honestly passed upon, it is final and conclusive on the courts if a full opportunity to be heard was given."

U. S. vs. Greenwalt, 213 Fed. 901.

C.

The Interpretation of the Immigration Laws in the Expulsion of Aliens.

Under this heading may be discussed the points contended for by counsel for aliens on page 13 of their brief, from which the following is quoted:

"And, in this respect, attention is directed to the distinction that must be drawn between the *exclusion* of an alien applying for admission, and the *expulsion* of an alien received and welcomed under the strict and proper enforcement of the immigration laws."

From this statement it is inferred that counsel mean:

I. That *expulsion* (not exclusion) of aliens *likely* to become public charges is not within the interpretation of sections 2, 20 and 21 of the immigration laws;

II. That the promulgation of rule 14 by the Commissioner-General of Immigration was in excess of the power conferred upon him by section 22 of the immigration laws.

Under the first subdivision may be discussed what counsel for aliens have considered a new and novel point of law in distinguishing between *exclusion* of aliens and the *expulsion* of aliens.

It can be agreed at the outset that in this case we are not dealing with the *exclusion* proceedings, but are involved in *expulsion*. The distinction between the two terms, although partly self-explanatory, may be simply explained by stating that an exclusion proceeding refers to the debarment of an alien who is seeking admission, the alien being at that time in the custody of the immigration officials. In such a case there is no warrant of arrest emanating from the Secretary of Labor. *Expulsion* refers to the deportation of an alien who has in any manner gained entrance into the United States, whether rightfully or mistakenly, and in violation of law. The custody in the latter case can only be acquired by a warrant of arrest from the Secretary of Labor, and when the record is sent up to the Secretary of Labor it is his prerogative either to cancel the warrant of arrest, or issue a warrant of deportation and have the alien *expelled* from the United States. Then it is expulsion with which we are concerned in these cases, since the aliens are in the United States, having presented certificates of landing on American soil, namely, the Philippine Islands.

From page 10 of counsel's printed brief the following statement is quoted:

"If the public charge theory were worthy of consideration the circumstances of the cases of these twenty-two Hindus clearly raise them out of that class, as nowhere has it even been suggested that these Hindus, or any of them, ever was a public charge, anywhere in the world."

Reasoning from this counsel would have the Court rule that sections 20 and 21 can only be used for the *expulsion* of public charge aliens where these aliens have actually *become* public charges within three years, but that those *likely* to become public charges cannot be expelled or sent out of the country by virtue of sections 20 and 21. In a word, the petitioner's contention is that sections 20 and 21 have no application whatsoever to the *expulsion* of *likely* to become public charge aliens, but only the expulsion of those who are *actually* public charges within three years. With this limited construction of the law the government cannot agree in interpreting that the law shall be used for *expulsion* in the one case but not in the other.

In supporting the contention of the government two questions must be answered: (a) What is meant by "in violation of law" in section 20 and "in violation of this Act" as set forth in section 21; and (b) Must the immigration officials wait until the landed alien has *actually* become a public charge before beginning expulsion proceedings?

(a) What is Meant by "In Violation of Law" and "In Violation of This Act?"

In violation of law does not mean that the alien is charged with any crime or that he is being prosecuted for any offense. It simply means that his characteristics are such that he is of a type which places him in one of the *excludable* classes established by section 2 or any other of the immigration laws. If the alien was admitted or landed yesterday and today the immigration officials discover that they have made a mistake, then they may cause the alien to be arrested for the purpose of rectifying that mistake. If the alien has entered through an error of judgment and it is subsequently learned that he is *likely* to become a public charge and was so at the time of entry, he is just as clearly within the country in violation of law or in violation of this Act and is just as clearly subject to *expulsion* as are the insane, the tuberculous or any other of the excludable classes in section 2.

In those cases in which the *expulsion* of an alien is contemplated on the ground that he is likely to become a public charge, it is invariably shown that upon the admission or primary inspection the alien has either expressly misrepresented himself or he has failed to disclose certain material facts which, if known, would have necessitated exclusion. An alien may gain admission on primary inspection who at the time of entry gave no indication that he was a person likely ever to become a public charge and who may immediately after engage in practices which dis-

close latent possibilities existing at the time he entered which, if known, would have placed him in the class likely to become public charges under section 2. Those possibilities may be found in his profligacy, indolence, criminal tendency, physical conduct, moral degeneracy or mental deficiencies. It follows then that if the material facts discovered subsequent to admission of the alien who has gained such admission under color of right, whose condition, tendencies, constitutional inclinations or habits indicate upon such subsequent investigation that at the time of entry he had these defects but that they were latent and concealed, such mistake on the part of the immigration officials may be rectified in an arrest proceeding for expulsion.

The question naturally arises, is there no finality in the decision of the immigration officials? Is not the landing of an alien by the immigration officials *res adjudicata*? Where is this authority for the rectifying of mistakes and errors of judgment? The courts have a unique and rather one-sided view in the matter of such reviews of judgment. It may be stated that where the immigration ruling has been *favorable* to the alien it is subject to recall and reconsideration, but where *adverse* to the alien the decision is *final*.

The court decisions are supported by the immigration laws in this rule of reconsideration and finality. Section 24 in defining the powers of immigration inspectors has this provision:

"The decision of any such officer if *favorable* to the admission of an alien, shall be subject to *challenge* by any other immigration officer."

Section 25, in defining the powers of boards of special inquiry, concludes with this statement:

“That in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if *adverse* to the admission of such alien, shall be *final*, unless reversed on appeal to the Secretary of Labor.”

Judge Gilbert, in deciding the case of *Lee Quen Wo* vs. *United States*, 184 Fed. 685, at page 688, which came up before this Court, made the following comment:

“It is urged that the order of the commissioner of immigration admitting the appellant into the United States estops the government to deny the legality of his entry, and constitutes a bar to this proceeding, and reference is made to the language of the opinion in *Chin Yow* v. *United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369, in which the court *sustained the finality* of the decision of the immigration officers upon a hearing concerning the right of a Chinese to land in the United States, and said that thereafter the merits of the case were not open. But that case, and other decisions of the Supreme Court, go no further than to hold that the right of a Chinese applying for admission into the United States is determinable by the proper immigration authorities, that their decision when *adverse* to the applicant, and the hearing has been properly had, and the applicant’s remedy has been exhausted upon an appeal to the Secretary of Commerce and Labor, is *final*, and there is no right of recourse to the courts. The court in so holding gave effect to the statute of August 18, 1894 (Aug. 18, 1894, c. 301, 28 Stat.

390), which provides that the decision of the appropriate immigration or customs officers, if *adverse* to the admission of such alien, shall be *final* unless reversed on appeal to the Secretary of the Treasury. There is no statutory provision that the decision, if *favorable* to the applicant for admission, shall be *final*. The decisions have been to the contrary. *United States v. Lau Sun Ho* (D. C.), 85 Fed. 422, and cases there cited; *Mar Bing Guey v. United States* (D. C.), 97 Fed. 576."

The courts have decided in two very clear-cut opinions that the immigration officials may arrest and *expel* aliens whom they had mistakenly admitted and who were members of the *excludable* classes at the time of entry. These cases, *Pearson vs. Williams*, 202 U. S. 281, and *The Japanese Immigrant Case*, 189 U. S. 87, held that the decisions admitting or landing aliens are not matters *res adjudicata* and are subject to reversal upon a hearing to correct errors of judgment. See also *United States vs. Williams*, 175 Fed. 275.

(b) Must the Immigration Officials Wait Until the Alien Has Actually Become a Public Charge?

The provision of section 20 which states "and such as become public charges from causes existing prior to landing" is the basis for the petitioner's contention that the law does not authorize or empower *expulsion* until the alien has gone beyond the stage of likelihood.

Can it be conceived that the apparent intent of Congress should be defeated because in making such

provision in section 20 it did not specifically mention the class of those *likely* to become. All the sections of this Act must be read together, not merely sections 2, 20 and 21, but all from and including 1 to section 25 of the entire act. In section 21 there is a provision as follows:

“In violation of this Act” (meaning the act as a whole) “or *any* law of the United States.”

Is it not clearly a violation of this *Act* or *any* law if an *excludable* alien, namely, one likely to become a public charge under section 2, has been mistakenly and through manifest error permitted to land in the United States, to say that an alien who was likely to become a public charge at the time of entry cannot be deported merely because he has not yet *become* such, and because if he had, or should within three years, he can be deported on that ground alone, seems to be a refinement of reasoning not justifiable in construing and applying remedial statutes such as the immigration laws. It is only by reasoning along lines similar to the foregoing that a meaning can be assigned each provision of sections 20 and 21. As a matter of fact, said sections were not new legislation when they were enacted so far as they contemplated the *expulsion* of aliens on the ground that they were likely to become public charges at the time of entry, but were merely a re-enactment of already existing legislation and the placing of the law in more emphatic form than it had previously stood. When the Act of 1907 was passed the practice of arresting and

expelling aliens on this ground had been continued for some time. This practice had prevailed in cases in which aliens deemed likely to become public charges were arrested soon after being landed even before the passage of the Act of 1903. This last assertion is supported by no less evidence than the statement of facts in the *Japanese Immigrant Case*, 189 U. S. 86-87, which related to a Japanese woman arrested in 1901 after she had entered the country, one of the charges against her being "likely to become a public charge". In that case the action of the administrative officers was upheld by the Supreme Court and the decision has repeatedly been cited since in support of numerous propositions arising under this phase of the immigration law.

The Acting Commissioner-General in an opinion rendered recently in discussing this point, said:

"Unless the statute is given the construction above contended for, a considerable nullification of its provisions would result—a large class of aliens that the law clearly intends shall not be permitted to enter or remain could not be removed, and after staying for three years could become public charges and still be immune from expulsion although their maintenance would be a public burden. To state an extreme, but by no means impossible illustration: Suppose an alien is admitted today, the inspector or the Board concluding that he is admissible, and tomorrow there should be brought to the Secretary's attention evidence clearly indicating that such alien was all the while likely to become a public charge; must the Secretary wait, possibly almost three years, for his conclusion to be borne out by the alien's *actually becoming a*

public charge, before he can start proceedings for his removal, and lose the right to remove if he does not become such until the three years have expired? The mere statement of this supposititious case reduces the contention to such an absurdity as not to be countenanced in construing a statute of police and public security like the immigration law, which by all canons of construction is to be construed liberally to effect its purpose. (*Japanese Immigrant Case*, 189 U. S. 96, 97.)”

II. Was the Promulgation of Rule 14 by the Commissioner-General of Immigration in Excess of the Power Conferred Upon Him by Section 22?

In discussing this heading it may be considered from two phases, (a) Does section 22 confer such power upon the Commissioner-General; and (b) Does rule 14 regulate the movements in the United States of aliens once landed?

(a) Does Section 22 Confer Power Upon the Commissioner-General to Make Rule 14?

Section 22 contains a statement, among other provisions, that:

“He shall establish such rules * * * as he shall deem best calculated for carrying out the provisions of this act.”

This seems to give the Commissioner-General unlimited power to act within his discretion. Rule 14 is merely used for assistance and advice in determining the manner of procedure for enforcing the provisions already set forth in sections 20 and 21. Wherein does rule 14 contravene any of the terms of sec-

tions 20 and 21? Is it not an explanation of those sections? Rule 14 then is really superfluous for the immigration laws had already provided adequate means for the expulsion of aliens.

The only reason that can be ascertained for its existence is the fact that certain steamship companies advertised throughout the Philippine Islands and parts of Asia cheap rates of transportation for immigrants going to the United States. It is understood that rule 14 was promulgated to intercept this immigration and put the transportation companies upon notice that aliens coming to the United States in *violation of law* must be returned to the country from which they came at the company's expense, in accordance with section 19 of the immigration laws. Rule 14 may have had such a preventive effect.

(b) Does Rule 14 Restrict the Movements of Aliens Once Landed in the United States?

The contention of counsel for the aliens is that rule 14 provides for the landing of the aliens upon a condition or contingency, in the insular territories of the United States. The statement of their views may be found on pages 14 and 15 of their brief:

"This means that if twenty-two coal miners from Newcastle were to be admitted at the Port of New York under the proper administration of the immigration laws and were to go to the coal fields of Pennsylvania, they would remain undisturbed so long as they remained in the coal fields as miners, but, if they were to depart from New York and sail to the Port of New Orleans,

they could be expelled from the United States on the same reasoning, * * *

With this statement the government cannot agree. It has been clearly demonstrated that aliens were using the Philippine Islands as a stepping stone to the mainland of the United States. Rule 14 was simply to give notice that aliens applying at Manila for admission where the immigration inspection, supervised by the War Department, might be more or less lax, and being there given the landing certificate, could not expect that such certificate would be an "open sesame" into the United States if they concealed certain facts in Manila, or if the examination was so cursory as not to discover at that time that the alien had all the demerits to qualify him for the class likely to become a public charge. Rule 14 does not say to the alien "You may stay in the Philippine Islands, but if you go to the mainland you will have to prove that you are not a person likely to become a public charge". The rule simply provides that if the alien *does* go to the mainland and the immigration officials there learn that at Manila there was an error of judgment, in that at the time of entry at Manila he was likely to become a public charge if he went to the mainland, the mere fact of his having traveled to the mainland should not be a bar to expulsion proceedings.

Suppose a Jew is landed today in New York and given a certificate and tomorrow he goes to Boston. There was no law preventing his *going* to Boston, but if he does *go* and it is at Boston that it is discov-

ered that the New York immigration officials committed an error of judgment, then he may be apprehended and the mistake rectified.

Take the example of an alien who might be landed at Vancouver, Wash., last week, upon the representation that he was going to work there in the mills, whereas in truth he intended to go to San Francisco where he had no employment and that he did go there. Suppose it were further shown that there were 7,000 men who were virtually public charges in San Francisco and that this alien was likely to become one of that number. Would not these facts when brought to light by a subsequent investigation by immigration officials in San Francisco show that considering all the circumstances surrounding the condition of the alien, he was a person likely to become a public charge at the time he entered Vancouver, Wash.? There is no attempt to *control the movements* of the alien, but if his determined destination, connected with other circumstances, is a material fact making up the alien's status, and such material fact has been concealed, he may subsequently be found to have been likely to become a public charge at the time of entrance.

V.

The government submits:

(1) That the hearings of the respective aliens before the immigration officials and the Secretary of Labor have indisputably been regular, open and fair. This alone upon the authority of the many court deci-

sions on the point of fairness should be sufficient to sustain the ruling of the Court below.

(2) There has not only been *some* evidence, but there has been ample and sufficient evidence. Each case was carefully dealt with separately. There has been no abuse of discretion in the departmental rulings based upon the evidence provided.

(3) In the matter of the interpretation of the laws in providing for the *expulsion* of aliens once landed who are likely to become public charges, it will be seen that the long-established rulings of the Department of Immigration have already determined the definition and the scope of those laws. The many clear decisions of the Federal Courts have for years sustained the departmental rulings.

Respectfully submitted,

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No. 2436

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

TIMOTHY HEALY,

Appellant,

VS.

SAMUEL W. BACKUS, as Commissioner
of Immigration at the Port of San Fran-
cisco, for the United States Government,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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Filed

APR 19 1915

F. D. Monckton,
Clerk.

Filed this.....*day of April, 1915.*

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

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APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

The appellant herein, for and on behalf of the twenty-two immigrants whose names are set forth in the petitions for writs of *habeas corpus* in this matter respectfully petitions this Honorable Court for a rehearing upon the issues determined in favor of the appellee and against the appellant by the opinion of this Court filed on the 18th day of March, 1915.

A brief restatement of the facts may aid the Court in the consideration of the arguments advanced in this petition for rehearing. The cause is founded upon petitions for writs of *habeas corpus*, the petitioners being high caste Aryan immigrants from India, members of the Caucasian race and subjects of Great Britain. They entered the United States by way of the Philippine Islands, in 1913, after examination and inspection by the immigration officials at Manila, and were granted certificates of admission pursuant to the rules of the Department of Immigration then in force. At the time of the arrival of the immigrants at the Philippine Islands there was in force and effect a rule of the Immigration Department enacted pursuant to the powers vested in and conferred upon that body by Congress providing that aliens admitted to the Philippine Islands would be entitled to admission to the mainland upon application, upon presentation of the certificate given to them by the officers at Manila, without further inspection or examination. After remaining in the Philippine Islands for a time, the immigrants departed for San Francisco. Subsequent to the arrival of the immigrants in the Philippine Islands but prior to their departure for San Francisco the rule of the immigration officials previously referred to was superseded by a rule which provided that immigrants arriving on the mainland from the Philippine Islands should be re-inspected and re-examined, and if found to belong to any of the classes excluded by the Acts of Congress govern-

ing the admission of immigrants, should be arrested and deported.

Upon the arrival of the immigrants at San Francisco they were arrested by the immigration officials at that place pursuant to the last mentioned rule, upon a warrant of arrest issued by the Commissioner of Immigration. Thereafter writs of *habeas corpus* were petitioned for by the immigrants, and the petitions were denied by the Court below. An appeal was taken to this Court, and the decision of the lower Court has been affirmed.

A careful consideration of the opinion rendered by this Court has led us to the belief that the Court has not been sufficiently impressed with the gravity of the situation and the seriousness of the international issue which may be precipitated if the opinion as rendered is permitted to stand and the immigrants are deported pursuant thereto.

**THE ORDER OF DEPORTATION IS VIOLATIVE OF EXISTING
TREATIES BETWEEN THE UNITED STATES AND GREAT
BRITAIN.**

The immigrants which the Government is seeking to deport, as stated in the opinion of this Court, are subjects of Great Britain. As such subjects, they are, under and by virtue of the existing treaties between the United States and Great Britain, entitled to all rights, privileges and immunities within the territory of the United States of subjects of the most favored nation.

Within the rights, privileges and immunities thus guaranteed to them are included all rights, privileges and immunities which are accorded to immigrants from the most favored nation seeking admission to the United States. There are by such treaties assured to these immigrants absolute immunity from discrimination of any nature whatsoever on account of race, color or religion.

The immigrants have been ordered deported because the immigration officials have found that they are likely to become public charges, but there can be no reasonable doubt, and the opinion of the Court below expressly finds that

“The finding that they were persons likely to become a public charge is based in reality, however much the immigration officers may disclaim the fact, upon the general showing and implied finding that there is a prejudice against the Hindoo.”

The proof upon which the order of deportation is based consists of affidavits procured by the Government in different parts of California, tending to show that immigrants from India are obnoxious and that there exists a prejudice against them. But it is not to be denied and the Court below also expressly finds, that this showing was not made as against any particular immigrant now seeking admission, but against immigrants from India generally as a race. The true reason for the arrest and deportation of the immigrants is found set forth in the application for the warrant of arrest as follows:

“The immigrants are likely to become public charges for the reason that they are of the laboring class; that there is no demand for such labor and there exists a strong prejudice against them in this locality.”

But upon the hearing before the officials there were presented three affidavits subscribed by responsible parties wherein it was alleged that there was work for immigrants from India in California and that they stood ready and willing to employ, and were desirous of securing the services of, the identical immigrants which the Government subsequently ordered deported. It is obvious that there was no foundation for the statement in the warrant of arrest that the immigrants were likely to become public charges and that there was no demand for their labor. There is left, therefore, but the third reason set forth in the warrant of arrest, and which the Court below found to be the real reason for the order of deportation,—“that there exists a strong prejudice against them in this locality”.

It is a dangerously novel doctrine which the Court below, and this Court, seek to read into the immigration laws of this country, in the light of conditions now prevailing in all parts of the world,—that an immigrant seeking admission to the United States may be arrested and deported to the land from whence he came for the sole reason, not that there is any particular objection to such immigrant personally but for the reason that he belongs to a race or is a subject of a nation against which there may

exist a prejudice in the particular locality in which he may chance to apply for admission.

The gravity of the situation has been succinctly stated by the learned judge of the Court below:

“Let there be no delusion that this power, once conceded, can be used only in the case of Hindoos. It is equally applicable to every other race. Conceding the power to the Department of Labor to exclude the Hindoo laborer for this reason, we must concede to it the power to exclude, for the same reason, the laborer of any other race. It is a vast power, and one which, upon the argument of this case, I was very unwilling to believe was lodged in any executive department of the Government.”

If the opinion of this Court is permitted to stand, then does it become a precedent for the deportation of an Englishman at the port of New York, for the reason, forsooth, that some Englishman has committed an offense in New York which has created a local prejudice against his nation; or for the deportation of a German at the port of New Orleans for the reason, perchance, that commercial interests in New Orleans have suffered by reason of the depredations of German air craft and a strong local feeling has been created against that nation.

We have always understood that the Acts of Congress respecting immigration, and the rules of the immigration officials promulgated pursuant thereto were of universal application. We have never understood that their enforcement was dependent upon either the whim or caprice of any particular

immigration official, or upon the feelings, passions or prejudices of any particular section of the United States.

The object to be attained by the most favored nation clause in treaties is to place all nations upon an equality (Devlin on the Treaty Power, Sec. 131). It is respectfully submitted that in none of the departments of the Federal Government is it to be more desired that strictly indiscriminating laws and rules be enforced than in the Department of Immigration, controlling as it does the entry into the United States of the peoples of all nations.

The immigrants now before this Honorable Court, if its opinion is permitted to stand, will be deported, not because of any objection to their personal qualifications, but because members of the race to which they belong have had the misfortune to incur the ill-will and prejudice of the persons whose affidavits form the basis for the order of deportation. During the existence of the Department of Immigration such discrimination has never before been attempted against immigrants of any other nation and we respectfully submit that the ruling of the Department, affirmed by this Court, if enforced, will constitute a denial to these immigrants of the rights, privileges and immunities accorded to the subjects of other nations applying for admission to the United States.

THE IMMIGRANTS SOUGHT TO BE DEPORTED ARE ENTITLED
TO CITIZENSHIP IN THE UNITED STATES.

The immigrants which the Department of Immigration seeks to deport have come to the United States with the intent to become citizens thereof. It is to be regretted that at the time of the hearing before the Department it was not deemed advisable by counsel then in charge of the matter to place before that body evidence of the right and of the intent of the immigrants now before the Court to apply for citizenship. We take the liberty at this time of placing this phase of the matter before the Court, and we respectfully request that permission be granted to lay before the Court such evidence by affidavit of the immigrants or otherwise as this Honorable Court may deem requisite to substantiate our contention.

The natives of India are divided into two classes,—those of the northern part being high caste Hindoos of pure blood and those of the southern part being what is generally termed of low caste and impure or mixed blood. The high caste Hindoos are of Brahmin faith and trace their ancestry back to the Persians and Medes of eastern Asia. These latter are members of the Aryan race, or Caucasians.

The immigrants in the present case are high caste Hindoos. It has never been doubted that the tribe to which they belong is of pure blood. That such immigrants are entitled to citizenship has been frequently decided by the Federal Courts and the question is no longer an open one. In *In re Akhay*

Kumar Mozumdar, 207 Fed. 115, Judge Rudkin in admitting to citizenship a native of India said:

“Whatever the original intent may have been, it is now settled by the great weight of authority that it was the intention of Congress to confer the privilege of naturalization upon members of the Caucasian race only. * * * It is likewise true that certain of the natives of India belong to that race, although the line of demarcation between the different castes and classes may be dim and difficult of ascertainment.”

A similar question arose in the United States District Court for the Northern District of California in the matter of the petition of Taraknath Jogendranath Das, a native of India, to be admitted to citizenship. In an opinion rendered by Judge Dooling (unreported) on July 5th, 1914, admitting the applicant to citizenship, the Court, citing *In re Mosumdar*, *supra*, and *U. S. v. Balsara*, 180 Fed. 694, said:

“It is difficult to determine the exact peoples intended to be embraced in the words free white persons but the trend of modern decisions is in accord with the cases cited above.”

The matter therefore resolves itself into this: that not only have the immigrants been discriminated against as between themselves and subjects of other nations seeking to enter the United States, and seeking to acquire citizenship therein, but there is discrimination between these immigrants as subjects of Great Britain, in India, and other subjects of Great Britain seeking to become citizens of the United

States, and migrating from parts of Great Britain other than India.

We respectfully urge that Congress never intended that immigrants entitled to the right and privilege of citizenship in this country should be barred of that right and deported upon a showing such as has been made by the immigration officials in this case. It is submitted that so long as there is extended to the subjects of nations of the white race without discrimination, the privilege of citizenship in the United States and that privilege is not contingent upon absence of prejudice against the class of which the applicant may be a member, then is it beyond the power of the Department of Immigration to deny to the immigrants in the present case the right of residing in the United States for the requisite period for the purpose of acquiring citizenship. If the United States as a nation deems the natives of India to be objectionable as citizens then it is for Congress to so signify and no department of the Government can usurp the function and duty of that body.

HAVING SUBJECTED THE IMMIGRANTS TO INSPECTION AND EXAMINATION, AND PERMITTED THEM TO ENTER THE UNITED STATES AT THE PORT OF MANILA, IT WAS BEYOND THE POWER OF THE DEPARTMENT OF IMMIGRATION TO SUBJECT THEM TO AN ADDITIONAL INSPECTION AND EXAMINATION AT THE PORT OF SAN FRANCISCO.

The method of procedure adopted by the immigration officials in this case has, so far as our research

reveals, never before been attempted. We have this situation: Prior to and at the time these immigrants left their native land, it was the law of this country that any immigrant seeking to come to the continent from the Philippine Islands might be permitted to do so upon presentation of a certificate given to him by the officials at Manila after examination and inspection or upon his arrival at that place. There was no requirement for additional examination at any other place to which he might wish subsequently to go for the purpose of obtaining work or for any other purpose. Indeed, up to that time no attempt had ever been made by the immigration officials to subject immigrants to more than one examination upon coming into the United States or into any of its possessions. These immigrants came to the Philippines, therefore, and were admitted to those islands with the implied consent of the Government that should they seek their fortunes in any other section of the United States, the certificate of admission granted to them at Manila would be sufficient evidence that they were properly entitled so to do. Presumably, conditions of labor in the Philippines were not to their advantage. At any rate, they departed from Manila for San Francisco with the intent of engaging in agricultural pursuits in California. But they found upon arrival at San Francisco that their examinations at Manila and the certificates of admission granted by the officials at that place availed them nothing. The regulations

in effect at the time of their entry into the Philippines had been revoked and in their place there had been enacted a rule which compelled them to again submit to examination, and subjected them to deportation if, in the opinion of the immigration officials at San Francisco, they fell within any of the prohibited classes.

If, in the enactment of such rules, the immigration officials are acting within the scope of their official duties as prescribed by Congress then indeed has there been delivered into their hands a vast power—the exercise of an authority the far-reaching injurious effects of which upon the labor conditions of this country it would be impossible to estimate. If such a rule be enforceable, then every immigrant laborer is virtually condemned to remain at the port of his original entry, and the opinion of the Department of Immigration is substituted for his own opinion with respect to the particular section of the country in which he may choose to labor and in which he may think his opportunities for success are greater. For, under the rule of the Department, which has been upheld by the opinion of this Court, every immigrant who moves to another section of the United States from the place of entry in the hope and expectation of improving his condition, becomes liable to arrest and deportation by the officials at the place to which he may remove upon the sole ground that, in their opinion, labor conditions are such that

he may not at such place readily obtain employment; or on the ground that in that particular locality there may be a prejudice against the particular nation of which by chance he happens to be a subject. No better scheme for regulating the supply of and demand for labor in the United States can well be imagined, and it is this vast power which, according to the opinion of this Court, has been lodged by Congress in the hands of the immigration officials of the United States.

We respectfully submit that it is neither the intent nor the spirit of the laws on the subject of immigration that an immigrant should be unceasingly harassed, and subjected and made liable to arrest and deportation, at any time after his admission in the United States, at the option of the immigration officials of the Government. It is our contention that the immigrants in this case, having submitted themselves to examination at the hands of the officials at Manila, and having been permitted to enter the territorial possessions of the United States, were no longer subject to arrest and deportation by the officials at San Francisco. We take the position that the finding of the officials at Manila that these immigrants were not likely to become public charges was not restricted to the Philippine Islands but entitled the immigrants to pursue their vocations in any section of the United States in which their services might be most advantageously utilized.

**THERE IS NOTHING IN THE RECORD TO SHOW THAT THE
IMMIGRANTS WERE LIKELY TO BECOME PUBLIC CHARGES.**

We do not dispute the well settled rule that if there is any evidence to sustain a finding of an immigration official, it will not be disturbed by the Courts. But, giving to that rule the widest latitude of which it is susceptible, nevertheless, we respectfully submit that the present case is devoid of testimony tending even remotely to establish the fact that these immigrants were likely to become public charges.

It is not denied by the Government that each of the immigrants had in his possession at least fifty dollars. In view of the fact that members of this race are of extremely frugal habits, such a sum alone would have sufficed for their needs for a considerable period of time. But in addition there were filed with the officials affidavits of responsible persons wherein there was offered present employment at good wages for each of the immigrants which the Government subsequently ordered deported. We respectfully direct the attention of the Court to these affidavits which we have annexed as appendices to this petition for re-hearing. On the other hand, the Government rests its claim that these particular immigrants are likely to become public charges upon general affidavits and statements secured in different parts of the state to the effect that there is strong prejudice against members of this race in those particular sections of California. We do not think that the immigrants now seeking admission should

be compelled to shoulder the burden of local prejudices which have sprung up in certain sections of California against the race to which they belong.

In the case of the *United States v. Williams*, 189 Fed. 915, the immigration officials sought to deport a husband and wife on the ground that they were likely to become public charges. It appeared that they had in their possession a small amount of cash (\$39.00) and several articles of jewelry. It also appeared that each of them had been offered employment at remunerative wages. In holding that there was no evidence before the officials upon which to base a finding that they were likely to become public charges and ordering their release from detention the Court said:

“Undoubtedly under the authorities, if there is any evidence in a case proving or tending to prove that an alien is within one of the excluded classes, the decision of the immigration authorities is conclusive, even if there is very weighty evidence to the contrary, and the courts have no jurisdiction to interfere. But if there is no evidence that an alien is within any of the excluded classes the immigration authorities have no power to exclude him, and the order excluding him is a nullity.

“In my opinion there is no evidence in this case that either of these aliens is within any of the excluded classes.”

If stronger proof were needed that the finding of the Department that these immigrants were likely to become public charges was absolutely without foundation, it may be found in the fact that in the

month of August, 1913, after the arrival of the immigrants at San Francisco and their arrest by the officials, they were released on bail; that they secured employment immediately upon their release, and that since that time and up to and including the present time they have been continuously employed in various agricultural pursuits, at remunerative wages, in one of the identical sections of the State of California in which it was alleged in the affidavits procured by the immigration officials there was strong prejudice against their race and in which as therein alleged it would be impossible for them, for that reason, to procure employment.

In conclusion, we submit that the case as a whole presents a situation of gross abuse of discretion on the part of the immigration officials stationed at San Francisco. We say this not unmindful of the fact that the Courts of the United States have confirmed at the hands of such officials many orders and acts for which in our opinion it would be hard to find any justification in the Acts of Congress relating to the admission of aliens. But in the present instance we believe that the immigration authorities have gone much further than they have ever gone before and that the order in this case, and the opinion of this Court in affirmation thereof, if permitted to stand, will prove a precedent dangerous,

highly inimical to the welfare of those seeking to immigrate to the United States.

Dated, San Francisco,
April 19, 1915.

Respectfully submitted,

FRED A. COPESTAKE,
*Attorney for Appellant
and Petitioner.*

WILLIAM T. HAWKINS,
Of Counsel.

(APPENDIX FOLLOWS.)

APPENDIX.

A.

State of California,
County of San Joaquin.—ss.

Sodager Singh, manager of Sodager Singh Company, being first duly sworn, deposes and says:

We are by occupation leaseholders of agricultural land in Palm Tract, County of Contra Costa, State of California. We are and have been for some time residents of the State of California and are of the Hindoo race and subjects of Great Britain. We work under our leaseholds one hundred ninety five acres of farm land in Palm Tract, County of Contra Costa, State of California. We have had long experience with Hindoos in the industry in which we are engaged, and require the assistance on a number of capable, efficient, and industrious men from time to time; and we have found the members of the Hindoo race to be capable, efficient, industrious, intelligent, peaceful and law abiding and eminently satisfactory as workmen. We are always glad of the opportunity to secure the services of such men for these reasons. There is a large demand for Hindoo labor at good wages in California at the present time, and such demand probably will continue for a long time to come. We are at present anxious and willing to employ fifteen (15) Hindoo laborers.

We are informed that there are now detained at the Immigration Station at Angel Island, about

twenty-five (25) Hindoos on the ground that there is danger that they may become public charges, and for that reason may be excluded from entry into the United States.

We are willing at the present time to employ fifteen (15) of said Hindoos in agricultural pursuits on the properties in which we are interested in Contra Costa County, California, and we know of many others who will be willing to employ that character of labor, and who will pay them good wages, and keep them in employment.

We had no previous knowledge of the arrival of the said Hindoos in this country, and knew nothing of their coming to the United States.

We further state from an intimate knowledge of commercial and labor conditions in California that at the present time there is no likelihood that any Hindoo coming to this country will become a public charge. There is ample work for Hindoos to perform at good wages for which they are well qualified and adapted.

There is no prejudice against the Hindoos in this state which interferes with their securing immediate and permanent employment at good wages.

(Signed)

SODAGER SINGH Co.,

By Sodager Singh.

Subscribed and sworn to before me this 14th day of August, 1913.

(Seal)

R. S. MILLER,

Notary Public in and for the County of San Joaquin, State of California.

B.

State of California,
City and County of San Francisco.—ss.

I. L. Borden, being first duly sworn, deposes and says:

I am a white male citizen of the United States, and of the State of California.

I am a member of the State Board of Agriculture of the State of California.

I reside at No. 2505 Devisadero Street, San Francisco California.

I am the president and general manager of the Victoria Farms Company, a corporation, organized and existing under the laws of the State of California, and I own ninety-five (95%) per cent of the capital stock of that company. That company is the owner of Victoria Island, a body of land in San Joaquin County, comprising about seven thousand, three hundred, thirteen and $28/100$ (7,313.28) acres; That tract of land is devoted to agriculture. I am not only the president and general manager of the company which owns the land, but I am actively engaged in the superintendence of agricultural pursuits thereon.

As such general manager, I now employ about forty (40) members of the Hindoo race, and I am anxious to immediately engage at least ten (10) more as soon as I can secure them.

I understand that there are about twenty-four (24) Hindoos now detained at Angel Island on the ground that they may become public charges. I am ready to engage at least ten (10) of these men because I need help. I do not know them, and did not know they were coming to the country, but I require Hindoo help, and find it most suitable for agricultural work. The members of this race are industrious, peaceable, law abiding and there is no prejudice against them which prevents their securing employment in this state. I have never heard of one becoming a public charge, and I do not know of any reason why any member of that race should become a public charge, as there is ample employment at good wages at hand for all that are in the State of California, and many more that may come to this state.

(Signed) I. L. BORDEN.

Subscribed and sworn to before me this 16th day of August, 1913.

(Seal)

W. H. PYBURN,

Notary Public in and for the City and County
of San Francisco, State of California.

C.

State of California,
County of San Joaquin.—ss.

Carson C. Cook, being first duly sworn, deposes and says:

I am the general manager of the Rindge Land and Navigation Company, which owns 21,300 acres of farming land in the State of California. The officers of the Rindge Land and Navigation Company are representative citizens of the State of California, one of the directors being Lieutenant-Governor A. J. Wallace, others being M. K. Rindge, president, Samuel K. Rindge, vice-president, F. B. Scotton, secretary; Fred H. Rindge, assistant secretary, George I. Cochran, director, and W. J. Williams, director. The company employs and for six years past, during my experience I have employed large numbers of Hindoos.

I have found the Hindoo to be as industrious, capable and upright working man as other nationalities in similar employment, and they are satisfactory, dependable and law abiding.

Throughout six years of experience with Hindoos I have not known or heard of a single instance in which a Hindoo became a public charge in any sense of the term.

There are at the present time positions for thirty (30) Hindoos on the lands of the Rindge Land and Navigation Company. These men are assured em-

ployment at good wages and are not at all likely to become public charges.

I have no prejudice against this class of labor and many land owners are glad to have Hindoos accept positions on the farms of the State of California at good wages and for work the year around in various capacities.

(Signed) CARSON C. COOK,
Affiant.

Sworn to and subscribed before me, Ada Rice Hughes, Notary Public of the State of California, in and for the County of San Joaquin, this 27th day of September, 1913.

(Seal) ADA RICE HUGHES,
Notary Public in and for the City and County
of San Francisco, State of California.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for a rehearing is, in my judgment, well founded in point of law and the same is not interposed for delay.

FRED A. COPESTAKE,
*Attorney for Appellant
and Petitioner.*

No. 2439

United States

Circuit Court of Appeals

For the Ninth Circuit.

FRANK M. PINDEL,

Petitioner,

vs.

NORMAN J. HOLGATE, as Trustee in Bankruptcy
of the Estate of FRANK M. PINDEL, Bank-
rupt, and the BANK OF NEZ PERCE,

Respondents.

In the Matter of FRANK M. PINDEL,

Bankrupt.

Petition for Revision and Transcript of
Record

In Support Thereof Under Section 24b
of the Bankruptcy Act of Congress, Approved
July 1, 1898, to Revise, in Matter of Law,
Certain Orders of the United States
District Court for the Central
District of Idaho.

Filed

AUG - 6 1914

F. D. Monckton,
Clerk.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Petition for Revision.]

*In the United States Court of Appeals for Ninth
Circuit.*

In the Matter of the Bankruptcy of FRANK M.
PINDEL,

A Bankrupt.

PETITION FOR REVIEW BY BANKRUPT.

To the Honorable, The Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

The bankrupt respectfully represents that he petitions under section 24 of the 1898 Bankruptcy Act for review to have the Court superintend and revise "in matter of law" the decision and orders of the Honorable United States District Court for the District of Idaho, Central Division, rendered, entered and made on petitions to review, supervise and revise decision and orders of the Honorable Referee, G. Orr McMinimy, in the matter of the bankruptcy of your petitioner, which said decisions and orders of the said Honorable United States District Court, and of the said Honorable Referee, and the petitions of the Bank of Nez Perce, of Mr. Finis Bently, and of the trustee, are hereto attached and made a part hereof.

And for the purpose of having the said decision and orders of the said Honorable United States District Court reviewed, revised and corrected and the proceeding in bankruptcy superintended, in matter of law, your petitioner respectfully represents and assigns that the Honorable United

States District Court erred in matter of law as follows, to wit:

FIRST: Erred (a) in holding, in effect, that the bankrupt is estopped by the matters named in the decision or opinion of the Honorable United States District Court to object to the allowance of the claim of the Bank of Nez Perce against his estate, and therefore, estopped to prove the matters and facts found by the Honorable Referee, and to have relief because thereof against the claim of the said Bank of Nez Perce; (b) erred in holding, in effect, that bankrupt is estopped to allege and prove payment or satisfaction of judgment of the Bank of Nez Perce under that rule of law which holds that where more than sufficient personal property has been seized on valid process of law and it has been so wasted, destroyed, or damaged by the sheriff, keeping it under such valid process, that the judgment debtor is deprived of the benefit of his said property, that it is conclusively presumed that the judgment is satisfied, or paid, to the extent of the value of the property so seized for payment of the judgment.

SECOND: Erred (a) in holding, in effect, that the bankrupt had not the right to urge and claim that the Bank of Nez Perce's claim, or judgment is paid in full, or to the extent of the property destroyed and wasted by the sheriff; erred (b) in holding, in effect, that the Honorable Referee had no right as matter of law upon the facts found by him to decide that the said bank's judgment is paid and satisfied in full; erred (c) in holding that the

bankrupt had no setoff, or counterclaim, within the meaning of the Bankruptcy Act of 1898 of Congress.

THIRD: Erred (a) in holding, in effect, that section 4185 of the Revised Codes of Idaho prevented the bankrupt from claiming and proving in the bankruptcy proceeding that the judgment of the Bank of Nez Perce was paid and satisfied to the extent of the property's value seized under lawful process by the sheriff in the case pending in the State court wherein the said judgment was recovered and entered on account of waste, destruction of, and damage to such property; erred (b) in holding, in effect, that section 4185 of the Revised Codes of Idaho prevented the bankrupt from claiming a setoff or counterclaim, or cross-demand in the bankruptcy proceeding for the value of the property sold at the void execution sale on the 6th of April, 1909; erred (c) in holding that section 4185 of the Revised Codes of Idaho bars, or extinguishes, the bankrupt's demand, or cross-demand, or setoff, or counterclaim, or whatever it may be called, accruing on the first and unlawful attachment which was dissolved by the State court in the original proceedings; erred in holding, in effect, that the case of *Willman vs. Friedman*, 4 Idaho, 209, decides that the bankrupt had to have the question of the Bank of Nez Perce's liability because of the first and unlawful attachment tried, adjusted and settled in the original case wherein the judgment was entered, and that if not so tried, presented and adjudicated, section 4185 of the Revised Codes of Idaho merged it in that judgment or extinguishes it so that it cannot form

the basis of relief in the bankruptcy proceeding, and cannot now be assigned by the bankrupt as ground or reason for wiping out the judgment of the Bank of Nez Perce, or as a reason for disallowing that judgment as a claim against his estate; erred (d) in holding that section 4055 of the Revised Codes of Idaho bars the right of the Bank of Nez Perce to sue the sheriff, and, because it does, in effect, prevents the bankrupt from now urging that the bank's judgment must not now be allowed against his estate nor paid out of his estate; (e), in so holding that Honorable United States District Court overlooks the fact that no statute bars a debtor's right to prove that a judgment against him has been paid and the further fact that the right of the debtor to prove that a judgment against him has been paid through waste and destruction of his property, or damage to it, by a sheriff who has held it under lawful and valid process does not depend upon the right of the judgment creditor to recover from the sheriff, but the right to have the benefit of such payment exists in cases where the judgment debtor because of his own fault cannot recover against the sheriff as well as in cases where the judgment creditor can recover from the sheriff, and by overlooking these rules of law, the court erred, and reached a wrong conclusion of law as to the judgment creditor's right to recover against the sheriff having anything to do with the judgment debtor's right to have the benefit of his property as against the judgment creditor.

FOURTH: Erred (a) in holding, in effect, that the bankrupt could not have the decision that the

judgment of the Bank of Nez Perce be not allowed and paid out of his estate because the matters and things found by the Honorable Referee were unliquidated damages not provable against the bankrupt's estate if held by the Bank of Nez Perce, or some other person against the bankrupt, and in passing the bankrupt states that the petition of the Bank of Nez Perce presents no such question of law for review; and (b) this holding is entirely erroneous for it omits the fact that bankrupt in proving and claiming payment of the judgment, which payment was found as a fact by the referee under the rule of waste is not proving a setoff, or a counterclaim, or a demand, or a cross-demand, against the Bank of Nez Perce, but is merely proving and establishing satisfaction and payment of the judgment held by the Bank of Nez Perce; erred (c) in holding that the damages because of the first and unlawful attachment cannot be adjusted and adjudicated in the controversy over the allowance of the judgment of the Bank of Nez Perce as a claim against bankrupt's estate to be paid out of his estate; erred (d) in holding that there are not sufficient facts found by the Referee, or sufficient evidence, to authorize damages; for the Referee found that the value of the property seized on the first attachment at the time it was seized was of the value of \$6,522.00, and as for conversion the measure of damages is the value of the property at or near the seizure on the unlawful attachment.

FIFTH: Erred in failing to order a credit for the sum of \$57.00, or the exact purchase price of the

five hogs sold to Dan Morgan under the agreement of July 10th, 1908, at private sale, which has never been credited as a payment on the judgment of the Bank of Nez Perce.

SIXTH: Erred (a) in reversing the order of the Honorable Referee, disallowing the claim of the Bank of Nez Perce; erred (b) in allowing the claim of the Bank of Nez Perce in the sum it did so allow it against the bankrupt's estate; erred (c) in allowing the claim of the bank of Nez Perce in any sum whatever; erred (d) in the conclusions of law which has resulted in the allowance of the claim of the Bank of Nez Perce against the Bankrupt's estate.

SEVENTH: Erred in holding in effect that the claim of the Bank of Nez Perce was placed beyond objection or contest by the proceeding heretofore had before the United States District Court for the District of Idaho, and the United States Court of Appeals for the Ninth District, originating on the trustee's petition to sell personal property and the bankrupt's homestead, which was being heard by the Honorable Referee, and removed from him by intervention of the bankrupt's wife; erred in holding, in effect, that the bankrupt by failing to make statement of the reasons he claims the Bank of Nez Perce's judgment is satisfied and paid when he first filed his schedules, and by failing to list them on the schedule for statement of setoffs and counter-claims, committed fraud on the bankruptcy court to such an extent that he is now estopped to show and prove the truth and the undisputed facts found by the Referee; for the schedules and petition show that

the bankrupt was a bankrupt even though the bankruptcy proceedings subsequently establish that there was an adjustment to be made as to the judgment of the Bank of Nez Perce, since the homestead is valued at not more than \$5,000.00 and claimed as exempt and no other property is scheduled when the schedules were first filed, and, therefore, these schedules show that the bankrupt had no property beyond the exemptions to pay the indebtedness which he admits he honestly owes, and furthermore, the bankrupt had an undoubted right to transfer the question of the adjustment of all matters between him and the Bank of Nez Perce to bankruptcy Court for adjustment and decision, and to have them decided upon the proceedings looking to the allowance of the judgment of the Bank of Nez Perce against his estate; furthermore, the bankrupt had a right to amend his schedules, and he had a right to object to the allowance of the claim of the Bank of Nez Perce, since the mere scheduling of the judgment does not allow the claim, or estop him from contesting the claim upon its being filed against his estate; in all courts the right to amend pleadings is recognized and enforced at any time before trial, at least, and even recognized at the trial; furthermore, the bankrupt was not bound by the law to schedule the judgment as paid, since it required a judgment of the Court to establish that it was paid in the way he claims it has been paid and satisfied; furthermore, the claim of the Bank of Nez Perce and the defenses against it were not before the Court, and in the proceedings, looking to an order of sale of a bankrupt's property, the

claims against the estate are not tried and allowed, and there is nothing which can prevent a contest against any claim which was not allowed at the time of the order of sale; it is not the law that the bankrupt only has a right to contest claims in the proceedings for an order of sale of his estate; the homestead has increased in value so largely that it will pay his exemption and all the expenses of administration and all claims even if the claim of the Bank of Nez Perce be allowed in the amount ordered by the Honorable District Judge, but this fact cannot justly deprive the bankrupt of defending his estate against the claim of the bank of Nez Perce; the Bank of Nez Perce is not injured by being held to strict account for the things it has done which are wrongful and for the acts of the sheriff; nothing can give the Bank of Nez Perce the right to have its judgment paid twice by the bankrupt; such a thing is devoid of all justice.

EIGHTH: The Court erred in confirming the sale made by the trustee to Orvil M. Collins.

NINTH: Erred (a) in reversing and setting aside Referee's order, refusing to confirm said sale; (b) erred in holding that the terms of the order and notice of sale were not so different as to avoid the sale; erred in holding that no further notice was necessary; erred in holding that Mrs. Pindel was not entitled to further notice; erred in holding that waivers of creditors filed on the trial of objections to sale cured the want of notice.

TENTH: Erred (a) in not passing on the question of the expenses of the trustee and the matters

presented by the trustee's petition for review of the order of Referee allowing attorney's fees and expenses and commissions of the trustee; for the bankrupt had a right to know the exact amount of money he should pay to the trustee to redeem his estate from bankruptcy administration, and if every person was paid all that is justly due them, they can have no objection to the bankrupt redeeming his estate from bankruptcy administration; (c), these matters should not have been left open by the Court as matters for future litigation and controversy and consumption of bankrupt's equity in his homestead; he should not be forced to pay to the trustee to redeem his estate from bankruptcy administration more than is justly due to all his creditors and for expenses of administration, and, if the Referee's order is right as to the amount of expenses of administration up to the hearing before him, it cannot require \$5,500.00 and interest thereon to pay claim of Bank of Nez Perce, the other claims, and all the expenses, even though the claim of the Bank of Nez Perce be allowed in the sum ordered by the United States District Court; the bankrupt desires to pay all his debts, since the great increase in the value of his property has made him able so to do, and the Referee adjusted all his obligations with the view of permitting him to pay the exact amount against his estate, legally and lawfully.

ELEVENTH: Erred (a) in failing to pass on the question of the validity of the execution sale made on the 6th of April, 1909, by Harry Lydon—

an ex-sheriff—on an execution issued after he—Harry Lydon— ceased to be the sheriff of Nez Perce County; erred (b) in holding that there was no agreement or understanding between Mrs. Pindel and the Bank of Nez Perce made on the 10th of July, 1908, for sale of attached property at private sale and application of proceeds to payment of debt; the petition of the Bank of Nez Perce does not raise any question as to this agreement not having been made; (c) erred in not noticing that the letter which is Exhibit 19 of the Bank of Nez Perce is a mere memorandum of an agreement which had already been entered into personally with Mr. O'Neil and with Mr. Dowd over the phone, which Mrs. Pindel attempted to make at the suggestion of Mr. O'Neil of the terms of the agreement; the letter is not the agreement; it is merely evidence of the agreement or arrangement; the agreement is set out in Mrs. Pindel's testimony and it is not denied by Dowd or by O'Neil, and five hogs under it were sold to Dan Morgan, and the sale of a small team for \$450.00 prevented by Mr. Dowd, and thereafter Mrs. Pindel employed Mr. I. N. Smith, and attempted to defend her property—all of which facts are found by the Referee and not called into question by the petition for review of the Bank of Nez Perce; the bankrupt requests the Court to carefully read the testimony of Mr. O'Neil as to this July, 1908, agreement and especially of how Mr. Dowd violated the agreement as found by the Referee, and it will be seen how the breach of this July agreement by the Bank of Nez Perce injured the bankrupt and resulted in all

the litigation which followed and all the damages being done; this agreement did not exist at the commencement of the action in the State court nor was it breached at the time of the commencement of the action, so, therefore, it cannot be within sections 4184 and 4185 of the Revised Codes of Idaho.

TWELFTH: Erred in deciding questions not presented by the petition for review of the decision and orders of the Honorable Referee, and especially not presented by the petition of the Bank of Nez Perce; erred in deciding against the bankrupt on technicalities which have absolutely defeated justice and set aside all equity, and upon matters that have absolutely no principles of estoppel, and which in no way has injured the Bank of Nez Perce, and have taken nothing from it or has not caused it to lose anything whatever, and which have placed it in no worse or different position than its own acts and the acts of the sheriff for which it is responsible put it.

A certified transcript of the decisions, orders, and petitions herein mentioned and other matters, papers, and evidence, necessary for the consideration and decision of the errors herein assigned, has been ordered, and the Clerk of the United States District Court of Idaho, as soon as possible, will certify such transcript, matters, evidence and proceedings to the Clerk of the Honorable United States Court of Appeals for the Ninth Circuit. And your petitioner respectfully requests that an order be made and entered, directing the manner and time of the service of this petition for review upon the Bank of Nez

Perce, upon Mr. Finis Bently, and upon the trustee in bankruptcy of the bankrupt's estate.

FRANK M. PINDEL,

The Bankrupt.

BEN. F. TWEEDY,

Attorney for the Bankrupt.

Postoffice Address and Residence, Lewiston, Idaho.

State of Idaho,

County of Lewis,—ss.

The undersigned bankrupt makes solemn oath that he is the bankrupt mentioned in the foregoing petition, and that the statements therein contained are true, according to the best of his knowledge, information and belief, and that the review is sought in good faith, and his attorney informs him that, in his judgment and belief, the errors assigned have merit and are well taken, and affiant says that the aforesaid review is not sought for delay, but that the proceeding for review is in good faith and for the sole purpose of having error of law corrected, which error of law is prejudicial to him.

FRANK M. PINDEL.

Subscribed and sworn to before me this 16th day of June, 1914.

[Seal]

G. ORR McMINIMY,

Notary Public in and for County of Lewis, and State of Idaho, Residing at ———, Lewis County, Idaho.

*In the District Court of the United States for the
District of Idaho, Central Division.*

In the Matter of FRANK M. PINDEL,

Bankrupt.

Opinion [Relative to Account of Trustee].

**MEMORANDUM RELATIVE TO ACCOUNT OF
TRUSTEE.**

June 11, 1914.

DIETRICH, District Judge:

There was submitted together with the claim of the Bank of Nez Perce and the question of the sale of the real estate an informal account of the trustee for moneys disbursed. The theory upon which this account seems to have been presented was that if the bankrupt could be advised of the total amount of the valid claims against the estate, including expenses of administration, he might be able to procure the funds with which to pay all of the indebtedness, and thus avoid the necessity of selling the land constituting the homestead. My first impression was that possibly I could with propriety pass upon the validity of the several items, but upon reflection I have reached the conclusion that the account ought to be presented in a formal way, and an opportunity given to creditors to object thereto. As is said in Collier on Bankruptcy (9th ed.), at page 664, in speaking of trustees' accounts, "Accounts are usually submitted to creditors at meetings called for that purpose, and if passed by them are approved." I have therefore decided to reverse the

order of the referee, without prejudice to a consideration of the trustee's account when the same is formally presented and a hearing relative thereto brought on in the regular way. In order that there may be no misunderstanding, it is proper to say at this time that the claim of the trustee for reimbursement for expenses incurred by him cannot be made a charge upon the \$5,000.00 exemption of the bankrupt. Such claims of the trustee as may ultimately be held to be valid are charges only against the estate, and the exempt property is no part of the estate, and is not subject to administration.

It should further be added that the trustee's accounts have no necessary relation to his right, such as he may have, to recover from the bankrupt and his wife expenses of litigation to which they have been unsuccessful parties. A trustee's account involves a relation only between the trustee and the estate, and not between the trustee and third parties. If the trustee has properly paid out any money on account of litigation upon behalf of the trust estate, he is entitled to reimbursement, even though the estate may not be entitled to recover the amount of such disbursement from the other party to the litigation. It seems that in the Circuit Court of Appeals, in the matter that was taken there for review, the trustee was awarded costs to the amount of \$285.70. If he paid out this amount of money on account of such litigation, he is entitled to reimbursement from the estate for the amount thereof, and in turn, as trustee of the estate, he is entitled to recover that amount from the unsuccessful parties

to the litigation, provided they have property subject to process. Their exempt property is, of course, not subject to process. Because of some apparent confusion, I desire to emphasize the fact that in his relation to other parties to litigation, the trustee stands like any other litigant. If he is successful and is awarded the costs, he may recover such costs for the benefit of the estate, but in all proper litigation in which the trustee is involved, as trustee of the estate, he is entitled to be reimbursed from the estate for his expenses reasonably incurred, whether he be successful or unsuccessful; and, of course, as to third parties he is subject to the same limitations, and must comply with the law and the rules the same as any other litigant, if he would recover from them the costs of suit.

Apparently there is no money in the hands of the trustee, and indeed there has been very little money with which to pay expenses. It is to be inferred that the Bank of Nez Perce, the largest creditor, has advanced some money for expense of litigation, etc. To what extent, if at all, the trustee can make claim for reimbursement on account of such expenditures is left for future consideration; that is to say, the trustee may present his accounts, and the whole matter,—what amount can properly be allowed, and upon account of what expenditure,—is left for the consideration, first, of the creditors, and thereafter of the referee, and thereafter, if any party is dissatisfied, of the Court, upon petition for review. It is, of course, desirable that no unnecessary expense be incurred in a hearing upon the justness or validity

of such claims as may be presented by the trustee, and in so far as the evidence already taken is pertinent and material, the parties to any controversy can doubtless agree that it shall be used, without the necessity of taking it over again, but the account should be presented anew, and in sufficient detail so that it may be easily understood, and, so far as possible, accompanied by vouchers for actual expenditures.

It may not be improper to suggest that if moneys come into the hands of the trustee available for the purpose of paying the expenses of administration, the referee could at once, and without a hearing, direct the trustee to pay to his counsel a fair amount upon account. Apparently counsel have rendered services covering a considerable period of time without any compensation whatsoever. Such payment could be made without foreclosing the question as to what shall ultimately be allowed as compensation in full. It is to be hoped that the estate may be brought to a speedy close, including the settlement of the trustee's accounts and the payment of all valid claims on account of expenses of administration.

**Transcript of Record in Support of Petition for
Revision.**

[Names and Addresses of Attorneys of Record.]

BEN F. TWEEDY, Lewiston, Idaho,
Attorney for Petitioner.

EUGENE O'NEILL, Lewiston, Idaho,
Attorney for Bank of Nez Perce.

*In the District Court of the United States for the
District of Idaho, Central Division.*

In the Matter of FRANK M. PINDEL,
Bankrupt.

Referee's Certificate on Review.

To Hon. FRANK S. DIETRICH, District Judge:

I, G. Orr McMinimy, the Referee in Bankruptcy
in charge of this proceeding, do hereby certify:

That in the course of such proceeding, an order, a
copy of which is annexed to the petition hereinafter
referred to and the original of which is hereto an-
nexed, was made and entered on the 11th day of
April, 1914.

That on the 19th day of April, 1914, Norman J.
Holgate, Trustee, and on the 20th day of April, 1914,
Bank of Nez Perce, a corporation, whose claim has
been filed and denied in said estate proceedings, both
feeling aggrieved thereat, filed petitions for a re-
view by the Judge of this court which review is
granted.

That a summary of the evidence on which such
order was based *proceeds* said order and is made a

part of said order and is made a part of this certificate by reference.

That the questions presented on his review are as to the allowance of the claim of the Bank of Nez Perce.

The confirmation of the sale of the real estate;

The allowance of an accounting by the trustee, and

The settlement of the estate.

I hand up herewith for the information of the Judge the following papers:

(1) The entire record of the evidence placed in typewriting by Davis E. Wolgamott under the direction and supervision of this Referee, together with copies of the exhibits introduced in evidence by the Bank, the Trustee and the Bankrupt, and all the exhibits, also all original papers introduced in evidence, with request at [1*] the time made that the original papers be made a part of the record in this cause.

(2) The Findings, Decision and Order appealed from.

(3) The petition on which this certificate is granted.

(4) All the other papers, not mentioned above, filed with me herein, all being deemed by me pertinent to this review.

Dated at Ilo, May 2d, 1914.

Respectfully submitted:

G. ORR McMINIMY,

Referee in Bankruptcy. [2]

*Page-number appearing at foot of page of original certified Record.

*In the District Court of the United States for the
District of Idaho, Central Division.*

IN BANKRUPTCY.

In the Matter of FRANK M. PINDEL,
Bankrupt.

Statement of Facts [of Referee].

This action came on for hearing on the 14th day of June, 1913, on motion of the Trustee Norman J. Holgate for an order affirming the sale of certain real estate and the settlement of certain accounts and charges attached thereto, and praying that they be charged against the exemptions of the bankrupt and objections of the bankrupt to the same and a petition of the bankrupt for an order allowing or disallowing all claims filed against this estate, showing cause why the claim of the Bank of Nez Perce against the estate should not be allowed and setting up a counterclaim against said claim and asking a judgment against the Bank of Nez Perce, and praying that after the claims are all passed upon and allowed or disallowed, to pay off said claims and expense in full and that these proceedings be then dismissed. To the objections and counterclaim set up by the bankrupt the Bank of Nez Perce makes answer. On these issues the matter has been heard and the Referee now renders his decision and makes such orders as he thinks just and proper in the premises.

STATEMENT OF FACTS.

After a careful examination of a large mass of

evidence introduced before him and the records of the case before him, the Referee has found very little conflict considering the length of the litigation involved and in many of these cases he has been able to reconcile them after considering the whole matter. He has been very liberal in his ruling on evidence because there has been a constant claim that the matter [3] has never been considered except by piecemeal, and he hopes that by having a full and complete hearing at this time that this expensive litigation will be stopped and stopped forever.

It appears that on the 26th day of December, 1907, Frank M. Pindel owed the Bank of Nez Perce \$2,950.00 on overdrafts; that on this date Mr. Dowd, cashier of said bank at that time, went to the Pindel homestead and asked Mr. Pindel for a note signed by his wife as an accommodation payor; that after much argument and persuasion Mrs. Sarah E. Pindel was induced to sign the note; this note was payable on demand.

Pindel was arrested in March, 1908, on a charge of stealing a steer and was taken to Lewiston and tried and found guilty and was taken to the penitentiary in Boise in May of the same year. After the trial Mrs. Pindel, assisted by two boys, went into the Little Canyon and rounded up 178 head of cattle and took them to Kendrick and sold them for \$3,831.00. The bank has made serious objection to her making this sale without paying their claim but Mrs. Pindel proves conclusively to me that these cattle were her own personal property.

Mrs. Pindel went to Boise during the month of

June of the same year to consult with her husband about securing a pardon and in regard to the settlement of his business affairs. Both Mr. and Mrs. Pindel testify that they talked over the sale of Mr. Pindel's property for the purpose of paying off this note. While she was away the Bank brought this action and on the 27th of June had an attachment issued.

When Mrs. Pindel came back from Boise she went to the office of E. O'Neill, attorney for the bank, and she and Mr. O'Neill agreed to have the property taken under attachment sold and the purchase price applied upon the debt; this was on the 10th day of July; Mr. Dowd was called on the phone and told of the agreement and Mrs. Pindel borrowed some stationery from Mr. O'Neill and made a written statement of the terms of the agreement and mailed it to Mr. Dowd (this is Creditor's Exhibit 19). [4]

Under this agreement five head of hogs were sold by Mr. Dowd to Mr. Morgan on the 14th of July. On the 17th of July Mrs. Pindel called up Mr. Dowd and told him she had a buyer for a small team, but Mr. Dowd told her that if she wanted to sell any more she would have to deal with the sheriff.

Mrs. Pindel then secured the services of Attorney I. N. Smith and he filed a demurrer on the 24th of July. The first attachment was quashed and a second attachment was issued on August 13th.

Mrs. Pindel returned again to Boise to take up the matter of the pardon of her husband, and in her absence and in the absence of her husband, on the 15th of February, 1909, a trial was had and a judgment

was entered against the bankrupt and his wife for \$3,635.16.

On March the 8th an execution was issued and placed in the hands of Harry Lydon, who had made the attachment as sheriff, but whose term of office had expired on the second Monday in January and Harry Lydon sold the balance of the grain and stock remaining in his hands on the 6th day of April, 1909. This execution was returned.

On the 6th day of December, 1909, another execution was issued, and under this execution proceedings were had in the Probate Court of Nez Perce County looking to the purpose of having the homestead appraised. An appraisement was made by three good and disinterested parties; the bank was not satisfied with this appraisement and they proceeded to ask for another appraisement. Soon after this the bankrupt filed his petition in bankruptcy in this court and was declared a bankrupt.

The trustee under the direction of Mr. O'Neill seized a large amount of personal property not scheduled in the bankrupt's petition, and without an order of the referee, which said property was afterwards claimed by the bankrupt's wife, and as such was set off to her by the Judge.

A meeting of creditors was called and duly noticed for the purpose [5] of passing on the question of selling the real and personal property, but before the Referee could pass upon the matters presented at this meeting the whole proceedings were removed by a petition in intervention to the Judge of this court by Mrs. Pindel. The Judge passed upon such matters

as were before him and made his order to the Trustee of January 5th, 1911, which order was affirmed by the Circuit Court of Appeals.

On the 1st day of March, 1913, a petition was filed by Mr. O'Neill *had an ex parte order order* signed by this Referee directing a sale of the real estate. A sale was had, and upon the motion to confirm this sale these proceedings were had before this Referee.

Under the first and void attachment the following property belonging to the bankrupt was taken by the sheriff over and above certain other property afterwards set off as exempt to his wife:

Property.	Value.
1 stallion.....	\$ 700.00
3 Bay mares, weight about 1400.....	900.00
2 black geldings, weight about 1200 each...	500.00
1 brown mare, weight about 1300.....	250.00
3 small saddle or work horses, weight about 1100.....	450.00
Six head of cattle, not returned.....	200.00
19 head of hogs.....	380.00
110 acres of oats at \$15.00 per acre.....	1650.00
35 acres of timothy.....	525.00
30 acres of Indian allotment of oats and wheat.....	450.00
Hay and grain in barn.....	100.00
Use of exempt horses while seized and held..	102.00
13 acres of timothy hay destroyed by pas- turing.....	195.00
Pasture on the Bunce Place.....	20.00
<hr/>	
Total.....	\$6522.00

There was no return on the first attachment and a small portion of this property was not returned as attached by the sheriff on his return on the second attachment.

The value set opposite the items are taken from the evidence of Mrs. Pindel supported by the evidence of such reliable and well-informed witnesses as W. T. Simmons, John McKenna, William Campbell and others. [6]

In addition to this the bankrupt is asking to set up a claim of damages for \$600.00 for the taking of property belonging to Mrs. Pindel, which claim I am of the opinion was fully proved and not disproved by the Bank, and Mrs. Pindel has agreed to allow this setoff of her claim to be made.

There is no evidence to show that this property was ever returned to the bankrupt or his wife after the dissolution of the void attachment, but the cost bill (Bank of Nez Perce Exhibit 14, at page 599 Trans.) would indicate that none of it ever was.

This property, or all of it that was not destroyed or died, was sold at three sales, one on the 14th of July, 1908, when 5 hogs were sold to Mr. Morgan under the July 10th agreement, one under order of Sept. 18th, 1908, by the District Judge, of a 2-year-old stallion and the balance of the hogs, and one on the 6th day of April, 1909, by Harry Lydon, when the grain and the balance of the stock were sold.

The first amounted to about \$57.00, the second to \$131.50 and the last to about \$2,000.00; the return on the execution is gone from the record and I cannot give the exact figures on this. The amount returned

on the last sale is the only amount that has been applied on the judgment. (See Judgment Docket "Bank of Nez Perce, Exhibit 17," page 605 Trans., Bank's Reply to Answer Brief of Bankrupt, page 51, Mr. Dowd's testimony Trans., 351.)

There was a great amount of grain wasted on the ranch after the attachment and the stock held until the April sale were in very *prro* condition. Orville M. Collins of Uniontown, Washington, was the purchaser of said stock at said sale and this stock was not in such condition but what they could be restored to normal condition by Mr. Collins by good care and feed before spring work commenced.

The Bank of Nez Perce has gone out of business and this action is continued by its attorney for the benefit of its president, Mr. Collins. This homestead has increased from a value of four or five [7] thousand to fourteen or fifteen thousand dollars in value during the life of this litigation and Mr. Collins is the purchaser of this land at this sale for \$10,500.00. The value has been proven by such reliable and competent witnesses as Mr. Lyons, Mr. Simmons, and others.

The bankrupt was kept in prison until the spring of 1909, when the Idaho State Board of Pardons found that he had been unjustly convicted and gave him a full pardon. The bankrupt was therefore not present during all of these proceedings in the District Court and his wife was left to take care of matters the best way she could.

Claims to the amount of \$258.50 have been proved and allowed in this estate to date.

Opinion of [Referee].

The Referee has covered the important questions of fact and any others that may occur to him will be mentioned by him as he proceeds to consider the law in connection with the facts in his opinion and the orders resulting therefrom.

He has read with pleasure the extended briefs of counsel for both sides, although his work has been difficult at times, owing to the failure of attorneys to make specific reference to page and line of the transcript when they refer to the evidence.

It is unfortunate indeed that so much valuable property should have been wasted in so much litigation, and the Referee takes up these matters in the same spirit as the Court expresses in his letter (Bankrupt's Exhibit 2, Trans., page 456) when he says that he is ready at all times to do anything within the authority of the law which may be necessary to bring about a settlement of the estate with the least possible loss or sacrifice to any of the parties concerned.

It is my opinion that Mr. Dowd expressed his honest opinion of the criminal proceedings in his letter of July 29th, 1908 [8] (Bank of Nez Perce's Exhibit 24, Trans., page 621) in the following words: "You still have the elements of manhood in you, if you are in the Pen, and it is my opinion, and the honest opinion of all acquainted with the case, that you didn't get a square deal," and that he would not have protested against the pardon had he not been so

advised for the purpose of making Mrs. Pindel "dig up."

The question of the allowance of the claim of Bank of Nez Perce appeals to me as the first for my consideration. In his order of the 20th day of May, 1911, the Judge of this court directs the sale of this land subject to my directions. This, I take it, leaves the sale largely in my discretion and I am of the opinion that an order of sale of \$15,000.00 worth of property for the purpose of paying a total of \$258.50 of allowed claims after the time for filing claims expired, especially for \$10,500.00 to Mr. Collins under the circumstances, thereby making a profit to him of four or five thousand dollars in the transaction, or the confirmation of such a sale, would be an abuse of such discretion and would not exhibit the spirit of the Court heretofore spoken of.

Counsel for the Bank stoutly maintains that the creditors whose claims have been allowed are entitled to interest but I find no law authorizing such interest and it has not been the practice of this Court to allow interest on approved claims after their allowance.

The Bank of Nez Perce bases its claim wholly on the judgment obtained in the State District Court; as against this the bankrupt claims a setoff of certain damages arising from a void attachment, a breached contract and a void execution sale and prays for a judgment for the difference between the amount of such damages and the amount of the claim proved.

The bank insists that if there were any such damages that they were not responsible for the acts of

the sheriff and his keepers; that under our statutes and the decisions of our Supreme Court such damages should have been set up as a counterclaim in the State Court, [9] and the bankrupt having failed to do so, they have become merged in the judgment and are now *res adjudicata*. Otherwise they should be tried out in the State Court before a jury, maintaining that a jury is a constitutional right.

We might say in passing that a jury is not an unknown quantity in the bankruptcy court, and if counsel for the Bank had requested one at the beginning of this hearing, he could certainly have had one.

Remington on Bankruptcy, sec. 404.

The question of setoffs, counterclaims and recoupments is covered by sec. 88a of the Bankruptcy Act of 1898. The term "Mutual Credit" as used in equity means a credit agreed upon by the parties, or arising out of connected transactions (Story Eq. Jur., sec. 1435), but in bankruptcy statutes "mutual credits" are extended to mean that the parties are, or in the natural course of events will be, creditors of each other. (Lowell Bankr., sec. 255.) So we see in the beginning that the Bankruptcy Courts are inclined to take a broad view of the question of set-offs, counterclaims and recoupments.

The position of the bank as to the merger of all damages in the judgment and therefore *res adjudicata* might be correct if this action had followed the usual course of events, that is, if the property taken under a void attachment had been returned to the bankrupt, if there had been retaken and sold at a

valid execution sale, but this was not the condition of the record.

It seems to me that there is no question but the property sold on the 6th day of April was sold by Mr. Lydon after he had retired from office and under process issued after his term had expired and therefore void.

There is no return on the first attachment and therefore there is nothing to prevent the bankrupt from going behind the attachment and showing the property actually taken by the officer. [10]

This makes the officer a trespasser *ab initio* (4 Cyc. 507). The return, however, if there was one, would not be conclusive (Jefferson County Saving Bank vs. Eborn (Ala.), 4 So. 386), and the attaching plaintiff is liable for the damages caused by the officer and his keepers (Kerr vs. Mount, 28 N. Y. 659).

There being a void attachment and no return, and no return of the property to the defendant and a void sale under execution, there was a continuing damage from the time the first levy was made up and until the sale was made, and therefore the defendant's right of action did not fully accrue until judgment and execution, and the defense could not have been set up in an answer or in a cross-complaint.

Again, the Bank repudiated the agreement of July 10th, 1908, and the damages from this breach of contract extended over to the time of the final judgment, and I therefore cannot find any reason whatever that the bankrupt cannot urge the damages caused by the void attachment, the breach of agreement and the void execution sale.

It might also be said that the judgment has been fully paid and satisfied (17 Cyc. 1395, 1396 and notes 44, 45, 48, 49; Banks vs. Evans, 48 Am. Dec. 734; Brown vs. Kidd, 34 Miss. 291).

The attaching plaintiff has levied on \$6,522.00 worth of personal property to satisfy a judgment for \$3,635.15 or some \$3,000.00 more than enough to satisfy the judgment. The levy of an attachment or execution on sufficient personal property of the judgment debtor to pay the judgment amounts *prima facie* to the satisfaction of the judgment (23 Cyc. 1488, 1489; Freeman on Judgments, Vol. 2, 4th ed., pp. 819, 820, sec. 275, p. 817). The amount of personal property is so much greater than the amount of the judgment that it would only be justice and equity to hold that it has been satisfied under the facts in this case.

I agree with counsel for both sides that there has been much litigation [11] since the 24th day of July, 1908, over this matter but that does not excuse the destruction of so much property.

I do not think it necessary to go into the matter of the manner of the assessment of the damages and computing the interest thereon, as the setoff is so much greater than the claim and I am unable to find any authority for entering a deficiency judgment against the bank and in favor of the bankrupt.

It was not only the right but the duty of the bankrupt to examine all claims and advise the referee as to their correctness (Bankr. Act 1898, sec. 7a, 3), and if the trustee does not contest an unjust claim

as he has not in this case, it is the privilege of the bankrupt to do so.

Remington on Bankruptcy, sec. 826.

In this case it is admitted that the claim of the Bank as originally filed was not correct (Bank's Reply Brief to "Answer Brief of Bankrupt," p. 51).

In all that I have said here I have assumed that there was legal service made on the bankrupt of the summons in the original case. The Bankrupt denies this and denies the employment of an attorney to represent him in the case. In the hearing in the case before me on the 8th of August, the Bank introduced a number of copies of letters which Mr. O'Neill says passed between him and the warden of the penitentiary at the time, *when* tend to show that there was service, but the proof is very unsatisfactory at the most.

As to the sale, I am of the opinion that the petition for sale should have been filed and notices of a hearing on the same. This would have eliminated the cost of a sale under the circumstances surrounding the one made. At the time the *ex parte* order was made the Referee suggested this, but counsel for the Bank and trustee maintained that the notice given the creditors of the meeting held in December, 1910, was sufficient. He has evidently changed his mind, [12] as indicated by his filing at the August meeting of waivers of notice of a hearing on the part of certain of the creditors. This would not cure a void sale and especially as to notice to Mrs. Pindel, who is as much interested in the sale of her home-

stead as anyone could be.

Blood vs. Munn (Cal.), 100 Pac. 694.

As to the expense of the Trustee for taking and keeping personal property which was not in the schedules and without an order of the Court, by doing so the Trustee took this property at his own risk, and since this property has been held by the District and Circuit Courts to be property belonging to Mrs. Pindel, I do not feel like taking the expense of taking and keeping this property from the estate of the bankrupt.

Remington on Bankrupt, sec. —.

I find no authority for allowing the trustee a *per diem* for his work in the case. I can allow his expenses in certain cases, but he receives as his compensation for his work a Commission and nothing else.

I have examined the claim of the attorney for the trustee very carefully, and from circumstances I find that \$200.00 is a reasonable and sufficient compensation for all work done by him.

Appended to the report of sale is an accounting which under ordinary circumstances would be set out in a final accounting. I do not know why this was done except for the purpose of having the total amount taken out of the homestead allowance of \$5,000.00. This I could not do under the specific direction or the order of the District Judge of May 20, 1911, nor do I find any law for any such proceeding, as our statute contemplates that the bankrupt is entitled to the \$5,000.00 exemptions under any and all circumstances and this cannot be taken from him

either by law or by equity or on equitable grounds as claimed by counsel for the trustee and the bank.

Remington on Bank., sec. 2010.

Neither can I hold that the amount assessed against the bankrupt [13] and his wife in the Circuit Court should be assessed against the exemptions of the Bankrupt or against the estate for the reason just stated.

I would not pass on this account at the present time as the Referee has directed that the original receipts and vouchers be filed by the Trustee or his attorney, but now after a year has expired this has not been done, but the bankrupt has prayed for a settlement in the nature of a composition under the bankruptcy act, and I will do the best I can to adjust the whole matter.

Several of the witnesses whose claims for fees in previous hearings is based on testimony given as to the value of the homestead which was material to the consideration of the cause in the upper court I think should be allowed.

I do not think that the trustee is entitled to pay at \$3.00 per day for hunting hogs belonging to Mr. Pindel.

The Referee has the power to assess costs against the losing party in this proceeding.

I have been very liberal in my rulings on evidence because I have wanted the whole matter to come before me, and there has been a continual complaint that this case has never been tried out as it should be but only by piecemeal.

I do not think that the sum of \$10,500 is suffi-

ciently large to warrant me in ordering the confirmation of this sale.

Grain and hay raised by bankrupt after adjudication does not become a part of the estate. (Rem. on Bank., sec. 1130.)

Order [of Referee, Disallowing Claim of Bank of Nez Perce].

IT IS THEREFORE ORDERED that the claim of the Bank of Nez Perce be disallowed and the costs of this bearing be taxed in favor of the bankrupt and against the Bank of Nez Perce;

That the sale of the homestead be not confirmed;

That the accounting of the trustee be allowed in the sum of \$349.95;

That the bankrupt pay to the trustee within 30 days from the date of the filing of this order the sum of all allowed claims in the sum [14] of \$258.50; the sum of the expenses of the administration of the estate by the trustee as aforesaid in the sum of \$349.95; the sum of \$5.83 commissions of Referee and filing fees on 13 claims, and the sum of \$17.28 commissions of trustee, making a total \$631.56, and the bankrupt is hereby empowered and authorized to execute and deliver a mortgage on said homestead for the purpose of securing said sum if necessary.

That if for any reason the bankrupt fail or refuse to pay said sum to the trustee, that the trustee sell said homestead to the highest bidder according to law and make return of said sale to the Court and upon confirmation thereof pay to the bankrupt and his wife the sum of \$5,000.00 and deposit the balance

in the Ilo State Bank, subject to the further orders of the Court.

That if the bankrupt pay said sum of \$631.56 to the trustee, that the trustee report the same to the Referee and deposit the same in the Ilo State Bank subject to the order of distribution of the same, which order the Referee will make when such report is made.

WITNESS my hand at Ilo, this 11th day of April, 1914.

G. ORR McMINIMY,
Referee in Bankruptcy.

[Endorsed]: Filed May 6, 1914. A. L. Richardson, Clerk. [15]

*In the United States District Court for the District
of Idaho, Central Division.*

In the Matter of FRANK M. PINDEL,
Bankrupt.

Opinion [of Dietrich, D. J.].

BEN F. TWEEDY, Attorney for Bankrupt.

FINIS BENTLEY, Attorney for Trustee.

EUGENE O'NEILL, Attorney for the Bank of
Nez Perce.

DIETRICH, District Judge:

The trustee in bankruptcy and the Bank of Nez Perce, a creditor, hereinafter called the Bank, submit for review an order made by the Referee on April 11th, 1914, allowing the trustee's account in part, rejecting the Bank's claim as a whole, and de-

nying confirmation of the sale of real estate. A voluminous and complicated record is presented, a mere sketch of which would be of inordinate length, and therefore I shall attempt little more than to state in brief the reasons upon which my conclusions are based.

FIRST: THE CLAIM OF THE BANK OF NEZ PERCE.

The proceeding is in voluntary bankruptcy. The petition and schedule were filed February 10th, 1910, and the adjudication was made February 14th, 1910, and thereafter a trustee was regularly appointed. On February 9th, 1911, the Bank's proof of claim was filed in due form with the Referee, but for some reason which does [16] not satisfactorily appear it was neither allowed nor disallowed, although no objection was ever interposed there to until after the lapse of more than two years, when the bankrupt set up the defenses now relied on, chiefly in the nature of counterclaims or setoffs. The claim is founded upon a judgment obtained by the Bank against the bankrupt and his wife, Sarah E. Pindel, in the District Court of Idaho, for Nez Perce County, on February 15th, 1909, for \$3635.16 and costs taxed at \$1747.12, making a total of \$5382.28. Upon this judgment there was credited the proceeds of the sale of certain attached property, amounting to \$1956.25, leaving a balance of \$3426.03, which, together with interest, constituted the claim as set forth in the proofs filed. In the schedule accompanying the petition in bankruptcy the bankrupt listed this as an unsecured claim against the estate,

there being a small discrepancy only, the amount schedules being \$3427.93 instead of \$3426.03. He now asserts that no such claim existed but that the judgment had been wholly swallowed up or extinguished by the setoffs referred to.

It is to be further noted that in the schedule, under appropriate headings, the bankrupt represented that he held no unliquidated claims or choses in action of any kind against any person. In explanation of the inconsistency of his positions then and now, he testifies that in making up the schedules he acted upon the advice of counsel, but his testimony in this respect is uncorroborated, and in the light of all the facts and circumstances I am unable to give it credence. If, however, we assume that he was advised to say nothing about the claims, what must have been his purpose in keeping them concealed? Was it to induce the Court to exercise a doubtful jurisdiction? Or was silence to be kept until the bankruptcy proceedings had terminated and the bankrupt had been discharged, thus leaving him free to press his claims for damages against the Bank after its claim had been wiped out? I can conceive of no other possible reason for such a course; but either purpose would constitute a palpable fraud from the results of which the perpetrator [17] ought not to be relieved. A debtor who has sought and secured the protection of a court of bankruptcy and has therein obtained a discharge from the obligation of his debts, as is the case here, will not be heard to impeach the truthfulness of the representations upon which his prayer

for relief was predicted.

Added to this consideration is the further fact that in the special proceeding relating to the sale of the real estate which resulted in the order of May 20th, 1911, later affirmed by the Circuit Court of Appeals, the bankrupt and his wife and the Bank as well as the trustee all participated, and although the necessity for making the threatened sale which the bankrupt and his wife sought to prevent rested upon the assumption that the Bank's claim was valid, at no time was it put in issue, nor was a suggestion ever made that the sale should not be ordered because there was substantially no indebtedness to pay. The primary question then, as now, was whether the homestead should be sold, and if the issue can properly be raised at this time, it could have been with equal propriety raised at that time. Not only was the justness of the claim then unquestioned, but inferentially the bankrupt admitted its validity. In their petition for review presented to the Appellate Court he and his wife represented "that the bank of Nez Perce, with a claim of \$3427.93, and C. C. Triplett with a claim of \$70.85, were the only judgment creditors, and that the balance of the claims scheduled and allowed as claims in the bankruptcy court were all in existence at the time of the appraisement and adjudication in the Probate Court, etc." Here is a clear implication of an understanding not only that the claim was valid, but that it had been allowed by the bankruptcy court, and such was the assumption upon which the proceeding was tried all the way through

and upon which the order of May 20th was made. Surely, if there had been any suggestion of the issue not presented for the first time, the Court would not have ordered a sale to pay a debt which might, in fact, prove to have no existence at all; it would have required that issue to be first [18] tried out. That was the time for the bankrupt to speak and to claim his defense if any he had. The Courts will not try a controversy in piecemeal; there must be an end to litigation. The bank was then seeking a sale of the real estate for the payment of its claim. If we now credit him, the bankrupt had two defenses. He pleaded one of them, went to trial, failed, went to the Appellate Court, again failed, and after all the delay and expense, and when the order of sale is about to be made effective, he draws from its concealment his other defense. Under a familiar rule he should not again be heard. A judgment is an adjudication not only of all defenses actually interposed, but as well of all which might have been interposed. It is thought that not only by the representations made in the schedules but by an order of May 20th, the bankrupt is estopped from setting up the counterclaims at this time.

But if we consider the facts so far adverted to not as amounting to an absolute estoppel but as being material only in so far as they tend to impeach the good faith of the bankrupt in asserting a claim for the first time after the lapse of between four and five years after the date of its accrual, during which period he was hard pressed by his debtor and had

every incentive and provocation to speak, the result must be the same. The judgment in the State court is unquestionably valid, and the sale of the attached property was legally made. Under the rule established by the Supreme Court of the State the judgment concluded all claims for wrongful attachment (*Willman vs. Friedman*, 4 Idaho, 209; 38 Pac. 937). But were it otherwise, undoubtedly the second attachment was valid, and the evidence is insufficient upon which to base a finding of damages on account of the execution of the first writ. Touching the charge of negligence it may be that the sheriff did not handle the property with the highest degree of skill. But we must remember that it is not one of the requisite qualifications of a sheriff that he be an experienced farmer or stock-raiser. Apparently the plaintiff was [19] not unmindful of the possible limitations of this particular sheriff in that respect or of the dangers of imposing upon officers of the court the duty of caring for, maturing, and harvesting a crop and holding it for the highest possible market, and caring for livestock of various kinds for an indefinite length of time, for it appears to have sought to have the attached property sold without delay. This application was successfully resisted by the defendants in the action, and apparently upon their suggestion the Court made an order in a measure limiting the discretion of the sheriff in incurring expense for the proper care of the property. The conduct of plaintiff's wife who, to say the least, is unusually resourceful and persistent, tended to render the duties of the sheriff un-

necessarily difficult, and at the sale to chill the bidding. It is, of course easy enough at this late day to produce opinion testimony tending to show that the property was worth much more than it sold for, and that it might have had better care. Upon such an issue the passing of time usually operates in favor of the claimant and against the officer, especially in cases where, as here, the officer is without notice that any claim of damages will be asserted and therefore has no reason to fortify himself by gathering and preserving the necessary evidence. It was doubtless for that reason that the legislature has provided (Sec. 4055, Subdivision 1, Revised Codes of Idaho) that an action upon such a claim against an officer must be commenced within two years from the time the cause of action accrues. The theory of the law urged by counsel for the bankrupt is that the defendant may maintain his action against the plaintiff for the negligence of the sheriff in executing the writ, and that the plaintiff's remedy in turn is against that officer and his bondsmen. But here the defendant waits until any remedy which the Bank may have had against the sheriff is cut off by the statute of limitations, and then for the first time asserts his claim. As a further consideration it is to be observed that upon his appointment these counterclaims vested in the trustee, and it is apparent that if he had brought a plenary suit thereon against the bank at the time they [20] were first put forward by the bankrupt in this proceeding, Sec. 4054 (Subdivisions 3 and 4) of the Idaho Revised Codes, pro-

viding for a three year period of limitations for actions for trespass upon real property and for taking or injuring personal property, could have been successfully pleaded in bar. While in terms these statutes do not apply to a proceeding of this character, the principle is the same; in equity the bankrupt should be held to be barred by his own laches.

Thus far the discussion has been upon the assumption that a claim for liquidated damages for a tort may be set off against a claim upon a judgment, but may this be done? If the question be referred to the Idaho Statutes, it is plain that under sec. 4184 of the Revised Codes the answer must be in the negative, for clearly the claim does not fall within subdivision 2 thereof, and in so far as it comes within the first subdivision, it should have been set up in the original action, and must therefore be held to be barred or extinguished under the rule of sec. 4185 and *Willman vs. Friedman, supra*. If the view be taken that the Idaho Statutes do not apply and that the question is to be referred to the bankruptcy act alone, seemingly the same conclusion is unavoidable. Sec. 68 provides for a setoff of "mutual debts and credits," but declares that a counterclaim cannot be allowed in favor of a debtor unless the claim is provable against the estate. Sec. 63 defines the claims which may be proved and provides in Subdivision b that "unliquidated claims against a bankrupt may, pursuant to application to the Court, be liquidated in such a manner as it shall direct and may thereafter be proved and allowed

against the estate''; but this provision is held not to enlarge the scope of subdivision a, and unliquidated claims arising out of torts, such as are here relied upon, are not covered by subdivision a. See Remington on Bankruptcy, Secs. 704, 705, 706, and cases cited thereunder. In Becker Brothers (139 Fed. 366) the precise question was involved. The impropriety of the *court* here pursued is shown of the counterclaims. [21] He simply finds that they exceed the Bank's claim, but if they may be waged as counterclaims at all, and if this proceeding be adopted as a method for the liquidation of the damages growing out of the alleged torts, they should be fully liquidated and determined, so that the estate may have the benefit of the surplus, if any there be, after offsetting the claims of the Bank.

Counsel for the Bankrupt severely criticises the Bank and its officers for the institution and maintenance of the attachment suit. True, such suits are often harsh and entail much unnecessary loss, and here the waste of property in expense of litigation, and in the deterioration incident to seizure and sale under judicial process, is most deplorable, but for the most part the defendants to the action must themselves bear the blame. Had the bankrupt remained in control, I am inclined to think that he would have met his obligations in a straightforward manner and there would have been no necessity for the suit, but the circumstances tend to show that when he was placed under disability, his wife started out with the purpose of evading their just obligations to the Bank. She sold enough prop-

erty to pay its claim in full, and although apparently there was no other need for the proceeds of the sale, she failed to apply any part thereof to the payment of debts and conducted herself in such a way as to give ground for the suspicion that she purposed to put all their property beyond the reach of the Bank. It is incredible that the Bank desired to do them any injury or had any purpose other than to secure protection for the indebtedness which was justly due it.

It is said that after the attachment was levied the Bank violated an agreement it made with Mrs. Pindel for the sale of the attached property at private sale. The facts relied upon are evidenced solely by a letter written by her to an officer of the Bank, and it is only necessary to say that no agreement is disclosed. The letter is wanting in the essential elements of a contract and amounts to nothing more than an indefinite conditional proposal.

To conclude upon this branch of the case, it is held that [22] the Bank's claim as shown in the proofs filed with the referee should be allowed for the full amount thereof subject to a deduction of \$131.50, which it appears was received by the attorney for the Bank and not credited on the judgment. Interest upon the amount since the filing of the petition may or may not be allowed, depending upon the facts as they may ultimately develop. *Brandenberg on Bankruptcy* (3 Ed.), sec. 1061.

CONFIRMATION OF THE SALE.

In sustaining the claim of the Bank I have dis-

posed of the principal objection to the confirmation of the sale. There are, however, some additional considerations.

On May 20th, 1911, after a hearing, in a special proceeding instituted by Mrs. Pindel, in which the bankrupt, the trustee and the Bank actually participated, and in which the bankrupt and his wife maintained that the land in question was a homestead and not subject to administration, I found the value of the property to be \$9,000.00, and directed that upon the payment into court by the bankrupt for the benefit of the creditors, of the sum of \$4,000.00 within thirty days, the entire tract be set apart as a homestead. In default of such payment the trustee was authorized to sell the land in the manner provided by law, and under the direction of the referee, for not less than \$5,000.00. Out of the proceeds of the sale, \$5,000.00 was to be paid to the bankrupt and his wife and the balance if any, was to be distributed in due course of administration. Being dissatisfied the bankrupt and his wife sought a review in the Circuit Court of Appeals where the order was affirmed, the mandate being filed here on April 9th, 1912. Now, it is clear that by this order no discretion was left either with the trustee or the referee touching the question of whether the property should be sold, provided a sale could be had for an amount in excess of \$5,000.00. Only the details of the procedure—**[23]** the time and place and manner of sale—were left to the sound discretion of the referee. Unfortunately this view did not prevail. If the bankrupt

had any cause to show why the sale should not proceed as directed, he should have applied to this Court, where the order was made, for its modification or for a stay of its execution. If this course had been pursued, instead of applying to the referee, whose only duty was to see that the order was given effect without unnecessary delay and who had no authority to grant a stay, much time and expense would have been avoided. However, at this juncture I am not so much concerned in determining who is primarily and chiefly at fault for the extraordinary delay which has intervened as I am in seeing that the proceeding is now brought to a speedy close.

As to the specific objections to confirmation, complaint is made, first, that the order of sale provides for the deduction out of the \$5,000.00 exemption allowed to the bankrupt and his wife, of the costs and expenses of the appeal to the Circuit Court of Appeals. While the provision is unwarranted, it is mere surplusage and clearly nonprejudicial.

As to the next objection, it is not thought that the terms of sale prescribed in the notice are necessarily in conflict with the order of sale; and unquestionably they are fair and reasonable.

Complaint is also made that notice was not given to the creditors of the hearing of the petition for an order authorizing the sale. But it appears that shortly before the intervention of Mrs. Pindel due notice was given as required by law of the hearing upon the trustee's petition for such order, and that at a meeting of creditors called for that purpose

a majority of them both in number and amount of their claims appeared and voted in favor of the sale. The referee thus acquired jurisdiction to make the order. No creditor now appears to oppose confirmation and eight out of the eleven whose claims were filed have in writing expressed their approval of the order; the three other claims are trivial in amount. Even if we assume that Mrs. Pindel was entitled to notice, it is to be observed that she originally appeared and in [24] both this court and in the Circuit Court of Appeals unsuccessfully opposed the sale.

The one remaining question is whether a fair price was bid. The highest amount offered was \$10,500.00, that being \$5,500.00 in excess of the estimated value placed upon the property in the schedules filed by the bankrupt, and \$1500.00 in excess of the value established by the order of May 20th. Whether a higher price could now be received is extremely doubtful. Probably if a contemplating purchaser could be assured that upon paying the price and receiving the trustee's deed his title would be exempt from assault and he would be left in peace, an advance could be realized at another sale; but neither the trustee nor the Court can furnish such a guaranty. Assurance can be given of good title, but not of the acquiescence or submission of the debtors. Perhaps in the case of any judicial sale the possibility that the title will be called into question tends to depress the bidding, but I am inclined to think that owing to the attitude of Mr. and Mrs. Pindel,

the consideration operates to an unusual degree in the present case.

As to the weight to be given to the findings of the referee I am not unmindful of the general rule invoked by the bankrupt. This rule, however, is not inflexible, and owing to conditions which it is needless to detail, I have felt it to be my duty to consider anew the entire record. Manifestly the referee was in a measure influenced by matters which are either wholly immaterial or are no longer open to consideration.

Although I have thus found that the sale was legally and fairly made, I am reluctant to confirm it forthwith and thus absolutely cut off all rights of the bankrupt and his wife. True, in some respects their conduct has, during the long period of litigation, been ill-advised, and it is apparent that if they had applied to the discharge of their obligations the energy and money spent in attempting to escape them, they would to-day be much better off, but I am inclined to deal tenderly with property constituting the home of a debtor, and so far as may be possible to preserve the value which by reason of its associations it has for him and for [25] no other. I have, therefore, decided to enter an order of confirmation, not to become absolute or final, however, until the expiration of thirty-five days from the date of the filing hereof and to become of no effect if within that period the bankrupt shall cause to be paid to the trustee, to be applied and distributed as assets of the estate, the sum of \$5,500.00, with interest thereon from April 5, 1913, at the rate of 7%

per annum up to the date of such payment. The order is to further provide that until such payment shall be made the bankrupt and his wife are restrained from selling or removing from the premises any of the hay or other crops growing thereon at this time, it being the intent that if redemption is not made within the thirty-five days as provided, the confirmation of the sale and title of the purchaser shall relate back to this date with provision hereafter to be made for the equitable division of the crops between the purchaser upon the one hand and the bankrupt and his wife on the other. I do not think that substantial injury will result to anyone by reason of this additional period of grace. Apparently the bidder at the sale was acting upon behalf of the bank, and if the latter gets the benefit of the purchase price with interest, or in case the debtor fails to make the required payment, the land and a just proportion of the crops, its rights will be substantially protected.

It may be proper to add that I see no reason why anyone who is willing to make a loan to the bankrupt should hesitate to take a mortgage upon the land in question in order to enable the bankrupt to raise the requisite amount, out of fear merely that the title is imperfect as a consequence of the bankruptcy proceedings. Upon the payment of the amount above specified, an order will be made absolutely releasing the property from administration and awarding it to the bankrupt free from all claims of creditors, and if the value of the property is as great as the bankrupt now represents it to be, he ought to have

no serious difficulty in procuring the requisite funds.
[25½]

The other phase of the case, namely, the trustee's accounts, it is unnecessary to dispose of at the present time, and that is left for future consideration.

Dated June 3d, 1914.

[Endorsed]: Filed June 3, 1914. A. L. Richardson, Clerk. [26]

*In the United States District Court for the District
of Idaho, Central Division.*

In the Matter of FRANK M. PINDEL,
Bankrupt.

**Order Confirming Sale of Real Estate and Contain-
ing Other Provisions.**

The petitions of the trustee and the Bank of Nez Perce for a review of an order of the referee dated April 11, 1914, denying confirmation of the sale of certain real estate to Orville M. Collins, made by the trustee at public auction on the 5th day of April, 1913, for Ten Thousand Five Hundred (\$10,500.00) Dollars, having been duly submitted and considered;

It is ordered that the said order of the Referee be and the same is hereby reversed, and said sale confirmed. Such confirmation, however, is not to become absolute or final until the expiration of thirty-five days from the date hereof, and if during that period the bankrupt, Frank M. Pindel or his wife, Sarah E. Pindel, shall cause to be paid to the trustee the sum of Fifty-five Hundred (\$5,500.00) Dollars with interest thereon at the rate of 7% per

annum until paid, to be applied and distributed as assets of the estate, thereupon this order shall become of no effect and said lands and the whole thereof shall be set apart as the homestead of said Frank M. and Sarah E. Pindel, and shall be exempt from administration and free from all claims of creditors. Upon the other hand, if said payment is not made within the time specified, upon the expiration of said period this order shall be deemed to be final and absolute, and the trustees shall, upon receiving the full purchase price, execute and deliver to said Orville M. Collins or his assigns a proper instrument of conveyance, and said conveyance shall be deemed to relate back to the date hereof. [27]

It is further ordered that until further order of this Court the said Frank M. and Sarah E. Pindel and all persons acting for them or under their direction be and they are hereby restrained from removing from said land or selling any of the hay or other crops now growing thereon; provided that in so far as may be reasonably necessary said crops and grass may be harvested, but not sold or removed; it being the intent that if redemption is made from said sale in the matter provided, all of said crops shall go to said Frank M. Pindel and wife; otherwise an equitable division between them and the purchaser shall be made. The lands hereinbefore referred to are described as being lots numbered One (1), Two (2), Three (3) and Four (4) in Section Thirty-four (34), and lots numbered Twenty-nine (29), Thirty (30), Thirty-one (31) and Thirty-two (32) in Section Twenty-seven (27), Township Thirty-four (34)

North, Range One (1) West of Boise Meridian, containing approximately One Hundred Sixty (160) Acres, all in Lewis County, State of Idaho.

Dated this 3d day of June, 1914.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed June 3, 1914. A. L. Richardson, Clerk. [28]

*In the District Court of the United States for the
District of Idaho, Central Division.*

In the Matter of FRANK M. PINDEL,
Bankrupt.

Order Allowing Claim of Bank of Nez Perce.

The petition for the Bank of Nez Perce for a review of the Referee's order of April 11th, 1914, rejecting its claim, having been duly submitted and considered:

It is ordered that the Referee's said order be, and the same is hereby reversed and said claim is approved and allowed for the principal sum of Thirty-two Hundred Ninety-four and 53/100 (\$3294.53) Dollars, together with interested thereon at the rate of 7% per annum from February 15, 1909, to February 10, 1910, the date of the filing of the petition, amounting to Two Hundred Twenty-seven and 30/100 (\$227.30) Dollars, making a total of Thirty-five Hundred Twenty-one and 83/100 (\$3521.83) Dollars. Interest to be hereafter allowed on said total amount from said last mentioned date, or with-

held, pursuant to general rules of law and as the facts may warrant.

Dated June 3, 1914.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: Filed June 3, 1914. A. L. Richardson, Clerk. [29]

268.

Testimony of Mrs. Pindel.

Q. When did you first know that you had been sued or that the property of either of you had been attached?

A. On my return from Peck I found the papers laying on the table at home.

Q. First state what was attached on the 29th day of June, 1908, on the first writ of attachment issued in the case of Bank of Nez Perce against your husband and yourself pending in the State court on that day in 1908, and, second, state how you know this property was attached, giving all the facts in the matter.

A. "i head of hogs, 14 head of horses, 8 head of cattle, 80 acres standing crop on Indian land (60 acres of wheat and 20 acres of oats on the Indian land), 160 acres at the home place (110 acres in oats on the home place, 35 acres of timothy, 15 acres pasture). My understanding is it was all attached, the papers that I found on the table when I came home from Peck and my trip to Lewiston, to see Harry Lydon, the sheriff, on July 10th, 1908, is how

(Testimony of Mrs. Pindel.)

I got my information. I went to Harry Lydon's office, the Sheriff's office, and he told me he had attached all the personal property and the homestead and advised me to go to Mr. O'Neill's office; he called Mr. O'Neill up over the phone at the Sheriff's office before I started to Mr. O'Neill's office, told me I had better go in there and settle with them if I could. I went to Mr. O'Neill's office, introduced myself to Mr. O'Neill, told him Harry Lydon had sent me there and *ask* him what we could do in the regards of settling the note, and about the first reply I got from Mr. O'Neill was that they would just tender me \$5,000 and put me off of that ranch. I told him if he would let me and release to me enough of the attached property that I could sell I would settle Frank Pindel's accounts or the note as far as I could. He said he would see Dowd—called Dowd up over the phone, talked to Dowd over the phone. After Mr. O'Neill and I had agreed to this settlement Mr. O'Neill asked me to write a letter to Mr. Dowd and tell him what I could do.

Q. Now, what settlement was it that you reached with Mr. O'Neill and Mr. Dowd, explain to the Court, at that time? [30]

269.

A. I told Mr. O'Neill that I could give them 200 acres of standing crop and the hogs and cattle they had attached and I would sell enough of the small teams to pay the note or Frank's account if I could. They *excepted* the offer, sold hogs to Dan Morgan, 5 head was to *appy* proceed of the sale to the note and I was to sell the attached property with the

(Testimony of Mrs. Pindel.)

understanding with the Sheriff that the proceeds of the sale should be applied to the note. Dowd sent Morgan to the home place after the hogs and it was mutually agreed, over the phone, between Dowd and the Sheriff and myself that the proceeds of the sale should be applied to the note.

Q. What did you get for the hogs sold to Mr. Morgan?

A. I don't know. I have never seen the return of the sale of the hogs.

Q. Has the Sheriff or Mr. Dowd at this hearing accounted for the proceeds of these hogs sold to Mr. Morgan at private sale? A. No, sir.

Q. You may state whether or not, while in Mr. O'Neill's office and after you had reached an agreement on the plan for the payment of the note to the Bank of Nez Perce and all the costs, if you wrote the Bank of Nez Perce's Exhibit 19, a letter dated July 10th, 1908. A. I did. [31]

Exhibit 19 [Letter, Dated July 10, 1908, Mrs. Sarah Pindel to D. V. Dowd].

On letter-head of E. O'Neill.

Ex. L. for Id.

July 10th, 1908.

Well Mr. D. V. Dowd:

I saw Mr. Harry Lydon today and told him the hogs you had attached was in need of feed and I thought best to have them sold to save feed Bills on them and if you are willing to sell them at a fair price and give me credit on the note do so, also you can have the 200 hundred acres of crop if we can agree on the price of the crop also some of the

teams the small teams, Wiley Wagner wants a team, probably Johney Klaus would give you a good price for the crop I will pay as far as I can, I think probably we can sell enough to settle the account in full I want the hacks and buggy sold and the two year old stallion and all of the small teams and now is the time to sell just before harvest.

MRS. SARAH PINDEL.

Good by

Do the best you can.

Exhibit Nineteen, Bank of Nez Perce, G. Orr McMinimy, Referee. [32]

366

Testimony of Mr. O'Neill.

On the day that Bank of Nez Perce's exhibit marked "Exhibit 19, Bank of Nez Perce, G. Orr McMinimy, Referee," being a letter dated July 10, 1908, Mrs. Pindel came to my office at Lewiston. We talked pleasantly together, the conversation being with reference to her settling the claim of the Bank of Nez Perce. After she had told me about the matters essentially as set forth in the letter I suggested to her that we call up Mr. Dowd and talk with him. At that time my office consisted of a room in front of the building, a room in the rear of the building and a smaller closed room between, in which was the phone and secluded from the other two rooms. My remembrance of the conversation with Mr. Dowd is I called him over the phone telling him Mrs. Pindel was there at my office and wanted to or

(Testimony of Mr. O'Neill.)

would talk with him about the claim of the Bank now involved in suit against her and delivered the phone to her. I think I passed to the rear office room leaving the door open and sat down instead of standing up in that little room while she was talking. After she had talked with Mr. Dowd about as set forth in this letter I suggested to her that she put that in writing so that it could be referred to and known afterwards what her proposition was. She thought it a good proposition. I furnished her pen and ink and paper, a bunch of my own letter-heads, as I now remember, and she wrote the letter and I think she mailed it, as I asked Mr. Dowd over the phone if he received a letter of that date and he said that I think that he had, and I had previously told him that she had written down her statements about as she talked over the phone in such a letter. When Mrs. Pindel went away she was still pleasant. I think nothing was said that could occasion any unpleasantness at that time, nothing was said about the homestead or giving her any sum of money as her homestead exemption. I would have remembered it if there had been. I had noted the old homestead filing of record and had not taken up any question up to that time in the case relative to the homestead. I talked with Harry Lydon afterwards and he stated his conversation with her on that day.

65.

Testimony of Mr. Pindel.

Q. Mr. Pindel, calling your attention to the following words in schedule A3 No. 1, being the same sheet of your schedule about which Mr. O'Neill inquired in his last question to you upon examination in chief and being the same schedule about which I have inquired in all my questions, to wit, "The debt due to each creditor must be stated in full and any claim by way of setoff stated in the schedule of property," and this sheet being only a schedule of the claims of creditors who are unsecured, you did not intend upon this *sheet* make any statement whatever of setoffs against the real true judgment of the Bank of Nez Perce. A. No.

Q. Now, noted upon this schedule A3 No. blank in the original petition and No. schedule A3 No. 1 in trustee's petition, I call your special attention to the fact that setoff counterclaim against this judgment. Bank of Nez Perce, should be entered under the schedule of the Bankrupt's property. Now you may state if at the time you made up this original schedule of the indebtedness and assets of the estate if you discussed the question of scheduling under the proper schedule with your then attorney the setoff against this judgment and what was his advice to you with reference thereto, and state the reason you didn't schedule in the schedule of property the setoffs against this judgment.

A. It was discussed and my attorney advised me, J. S. McDonald, that that would be an after con-

(Testimony of Mr. Pindel.)

sideration and that would be done later, and for that reason I went no farther with it at that time.

Mr. Tweedy *wish* to have Bankrupt's Answer to the claim of the Bank of Nez Perce marked Exhibit 7 for identification, G. Orr McMinimy, Referee, and ask the witness if that is your statement of the claim in favor of the estate against the judgment of the Bank of Nez Perce and whether you now offer the same as an amendment to your original schedule in the bankruptcy. A. Yes.

The bankrupt now offers in evidence Bankrupt's Exhibit 7 for identification, G. Orr McMinimy, Referee, as his amendment to his original schedule and as a part of his cross-examination.

Admitted in evidence. [34]

215.

Q. You may state whether or not in Feby., 1909, on or about the 15th or immediately before when the case was tried in the State court, if Mrs Pindel was at Boise assisting you in procuring your pardon.

A. Yes, sir, she was *staid* there until I procured my pardon and I came home with her.

Q. After you returned home and how soon after did you go and see Mr. Dowd, the cashier of the Bank of Nez Perce, if you did?

A. Not later than the second day.

A. *Not later than the second day.*

Q. Where and what was the conversation you had with Mr. Dowd and state what was said by yourself and by him?

A. The conversation was in Mr. Dowd's private office, in the Bank of Nez Perce, and I asked him

what his idea was for protesting against my pardon, and he said it was the advice of his attorney, he thought he would make the old woman dig up. He knew it wasn't right but that was the advice of his attorney, Mr. O'Neill, and I asked him what they had done with the property that he had written to me that they had attached, and he said he didn't know where it was or anything about it, and I said to him, "Now, Mr. Dowd, you get in and be a man and I will show you that I am a man," and he said he could do nothing, everything was left to his attorney. [35]

224.

Q. Do you know a man by the name of Orville M. Collins? A. Yes, sir, I do.

Q. Is he an officer of the Bank of Nez Perce? If you know, state what official position he holds, and for about how long he has held that.

A. Yes, sir, he is an officer; he is the president; he has held it from about 1905 and he holds it yet, as far as I know of, and is practically the owner of the bank.

Q. Is he the same man who purchased or pretended to purchase your homestead on the 5th of April, 1913, at the *truess* sale of the homestead?

A. Yes, sir, he is the same man.

Q. Did you ever see Mr. Collins in regard to settling or adjusting of the claim of the Bank of Nez Perce? If so when, and state what was said by himself and yourself in regard to the claim of the Bank of Nez Perce and your claim by reason of the proceedings in the State court in the case of Bank of Nez Perce against yourself and your wife, and the

(Testimony of Mr. Pindel.)

acts of the trustee in unlawfully and illegally seizing the property of your wife, and what statement, if any, did he make in regard thereto, stating the time, the place and who was present.

A. Yes, sir, I saw him and I talked to him some time in February, 1913, at Mr. Collins' own place in Nez Perce County, Idaho, 3 miles south of Genessee, and I asked Mr. Collins to account or settle for the property which he had taken from me in my absence and straighten matters in the State court and the Bankrupt Court, and settle up with me and stop proceedings, telling him that he had got the property individually. The property was not sold. He had it in his own possession as far as I knew. He acknowledged that he had the property and as far as the law proceedings was concerned he had left that to his attorney, Mr. O'Neill, and he had nothing to do with the management, and as far as his judgment was concerned, he had put that up as collateral to the people *whom* was carrying him and he was powerless as to settling matters, he had nothing to settle with except what the bank would allow him and that was but very little. There was no one present but him and I. [36]

455.

[Bankrupt's Exhibit 2—Letter (Unsigned) Dated
March 21, 1913, to N. J. Holgate.]

Boise, Idaho, March 21, 1913.

Mr. N. J. Holgate,
Culdesac, Idaho.

Dear Sir:

I have your letter of March 16th, making inquiry concerning some phases of the Pindel bankruptcy proceedings, and in reply I have to say that I could not with propriety advise you upon the subject. As Judge of the court, I shall of course, at all times be very willing to do anything within the authority of the law which may be necessary to bring about a settlement of the estate with the least possible loss or sacrifice to any of the parties concerned.

I would think that if the Pindels would follow the direction of some competent attorney some plan could be devised which would bring about the end sought to be reached as suggested in your letter.

Yours truly.

“Bankrupt's Exhibit Two” for Identification. G. Orr McMinimy, Referee. Introduced in evidence by Bankrupt. G. Orr McMinimy, Referee. [37]

*In the United States District Court for the District
of Idaho, Central Division.*

In the Matter of FRANK M. PINDEL,

A Bankrupt.

Praeipce for Transcript.

**PRAECIPE FOR CERTIFIED RECORD FOR
REVIEW UNDER SECTION 24b, BANK-
RUPTCY ACT.**

To the Clerk of the United States District Court,
District of Idaho.

The bankrupt, Frank M. Pindel, requests you to
certify to the Clerk of the United States Circuit
Court of Appeals at San Francisco, California, the
following matters, to wit:

The decisions and orders of the Honorable District
Judge in the matter of allowing the claim of the
Bank of Nez Perce, and affirming the sale of real
estate, giving 35 days for redemption, and reversing
the orders of the Honorable Referee; also the de-
cision, findings of fact, the opinion and orders of the
Referee, G. Orr McMinimy; also the following testi-
mony of Mrs. Pindel, omitting objections of counsel
and rulings of Referee, commencing with the third
question on page 268 of transcript, the remainder on
that page and all on page 269 down to and including
the answer "I did," being the third answer; also Bank
of Nez Perce's Exhibit 19, mentioned by Referee in
his statement of facts; testimony of Mr. O'Neill on
page 366 and down to and including the word "day"
in the 21st line on page 367; omitting objections and

rulings, the testimony of Frank M. Pindel, and commencing with the last question on page 65 and all on page 66, ending with and including the words on page 67, "Admitted in evidence"; commencing with the last question on page 215 and down to and including the answer to the second question on page 216, commencing with the last question on page 224 and down to the first question on page 226, omitting objections and rulings; also Bankrupt's Exhibit 2, page 456, Trans.

FRANK M. PINDEL,
By BEN F. TWEEDY, and
BEN F. TWEEDY,
Attorney for the Bankrupt.

[Endorsed]: Filed June 18, 1914. A. L. Richardson, Clerk. [38]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States for the
District of Idaho, Central Division.*

IN BANKRUPTCY.

In the Matter of FRANK M. PINDEL,
Bankrupt.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the foregoing copies of the Decisions and orders of the Honorable District Judge in the matter of allowing the claim of the Bank of Nez Perce, and affirming the sale of real estate, giving 35 days

for redemption, and reversing the orders of the Honorable Referee; also the decision, finding of fact, the opinion and orders of the Referee, G. Orr McMinimy; also the following testimony of Mrs. Pindel, omitting objections of counsel and rulings of Referee, commencing with the third question on page 268 of transcript, the remainder on that page, and all on page 269 down to and including the answer "I did," being the third answer; also Bank of Nez Perce's Exhibit 19, mentioned by Referee in his statement of facts; testimony of Mr. O'Neill on page 366 and down to and including the word "day" in the 21st line on page 367; omitting objections and rulings, the testimony of Frank M. Pindel and commencing with the last question on page 65 and all on page 66 ending with and including the words on page 67, "Admitted in evidence," commencing with the last question on page 215 and down to and including the answer to the second question on page 216, commencing with the last question on page 224 and down to the first question on page 226, omitting objections and rulings; also Bankrupt's Exhibit 2, page 455, transcript, Praecipe for certified transcript to United States Circuit Court of Appeals, and Clerk's Certificate,—have been by me compared with the originals and that it is a correct transcript therefrom and of the whole of such originals as the same appears of record and on file at my office and in my custody. [39]

I further certify that the cost of the record herein amounts to the sum of \$24.70 and that the same has been paid by the appellant.

Witness my hand and the seal of said Court this
20th day of June, 1914.

[Seal]

A. L. RICHARDSON,

Clerk. [40]

[Endorsed]: No. 2439. United States Circuit Court of Appeals for the Ninth Circuit. Frank M. Pindel, Petitioner, vs. Norman J. Holgate, as Trustee in Bankruptcy of the Estate of Frank M. Pindel, Bankrupt, and the Bank of Nez Perce, Respondents. In the Matter of Frank M. Pindel, Bankrupt. Petition for Revision and Transcript of Record in Support Thereof Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, Certain Orders of the United States District Court for the Central District of Idaho.

Filed June 30, 1914.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer.

Deputy Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

FRANK M. PINDEL,

Petitioner,

vs.

NORMAN J. HOLGATE, as Trustee in Bankruptcy
of the Estate of FRANK M. PINDEL, Bank-
rupt, and the BANK OF NEZ PERCE,
Respondents.

In the Matter of FRANK M. PINDEL,

Bankrupt.

Additional Transcript of Record

In Support of Petition for Revision Under Section 24b
of the Bankruptcy Act of Congress, Approved
July 1, 1898, to Revise, in Matter of Law,
Certain Orders of the United States
District Court for the Central
District of Idaho.

*In the District Court of the United States for the
Central Division, District of Idaho.*

IN BANKRUPTCY.

In the Matter of FRANK M. PINDEL,

Bankrupt.

**Order [of Referee in Bankruptcy Directing Sale of
Real Estate of Bankrupt].**

ORDER OF SALE.

The foregoing Petition having been duly filed and having come on for hearing before me, and it appearing that notice of at least ten days has been given to creditors of the sale of the land described in the said Petition and that at the meeting of the creditors so called a majority of the creditors and a majority in the amount of claims represented voted to sell the said land, now, after due hearing and due consideration of the decision of the said Court and of the Appellate Court in the premises and said vote of creditors to sell the real estate in said Petition described, it is ordered that the said Trustee, Norman J. Holgate, be and is hereby authorized, after four weeks' publication of notice and posting of written notice in three public places in Lewis County, Idaho, for the same period of time, to sell the real estate of the bankrupt in his petition described, at public auction at the door of the courthouse (where the District Court in and for Lewis County held its last term of Court) in the town of Nez Perce, Lewis County, Idaho, receiving no bid less than \$5,000.00, keeping an accurate account of the property sold and

the price received therefor, and to whom sold. He shall, from the proceeds of the sale, pay to the bankrupt and his wife said sum of Five Thousand (\$5,000.00) Dollars, less costs and expenses of review in U. S. Circuit Court of Appeals, and shall file said account at once with the Referee, reporting the balance for payment of fees and expenses [1*] and creditors' claims.

Witness my hand this 1st day of March, A. D. 1913.

G. ORR McMINIMY,

Referee in Bankruptcy.

[Endorsed]: Filed May 6, 1914. A. L. Richardson, Clerk. [2]

[**Affidavit of Norman J. Holgate Re Order of Sale.**]

ORDER OF SALE.

*In the District Court of the United States for the
Central Division, District of Idaho.*

IN BANKRUPTCY.

In the Matter of FRANK M. PINDEL,

Bankrupt.

State of Idaho,

County of Nez Perce,—ss.

Norman J. Holgate, being first duly sworn, on his oath says: That he is the Trustee in Bankruptcy, of the Estate of said Frank M. Pindel.

That he is the same person to whom was issued the order dated March 1st, A. D. 1913, copy of which is attached to his return of sale hereto attached, and

*Page number appearing at foot of page of original certified Record.

in said return marked Exhibit "A," and the same is a full and true copy of the original order returned into the office of the Referee in Bankruptcy in and for Lewis County on April 23d, 1913.

That affiant had been seeking to obtain for some six months an order of sale for the real estate prior to the date of said order of March 1st, 1913.

That the sale of the real estate as set forth in said return was legally made and fairly conducted, the land selling for much more than the appraised value, and no objection has been made to said sale or to the manner of its conduct.

That at the time of the making of the sale of said land on April 5th, 1913, pursuant to notice published and posted as in said return mentioned, the said Referee was away from Idaho, being, as affiant was informed, in Portland, Oregon. That immediately on learning of his return, this affiant verified his return and at once caused the same to be mailed to said Referee in Bankruptcy on [3] April 23d, 1913. And no action has as yet been taken thereon.

That the exhibits attached to the annexed return of sale are full and true copies of the original documents returned into the office of said Referee in Bankruptcy, making the annexed return of sale a duplicate of the copy filed with said Referee in Bankruptcy, except as to his name on the order for the sale of the real estate; that the document attached to this return is a full and true copy of said original order.

The land sold by affiant is timothy hay land, and the bankrupt and his wife, Sarah E. Pindel, are re-

taining the same by virtue of the delay of the Referee, apparently to secure the hay therefrom the present season.

The said land is now being occupied by said bankrupt and his said wife and the purchaser of said land is without remedy or recourse to secure the use, occupation and profits of said land by reason of such failure and neglect to confirm said sale and then directing a conveyance by this affiant to such purchaser, or refusing a confirmation affiant might resell the land or making it possible to sell the land in accordance with the order of this Court dated May 20, 1910, and affirmed on hearing on petition for review by said Sarah E. Pindel in the Circuit Court of Appeals at San Francisco, Cal.

Affiant asks that some action be taken by this Court to the end that affiant may be enabled to perform his duties, pay to creditors what will be due them, receive his own commission and be discharged without further vexatious and interminable delays, and your Trustee will ever pray, and further he now saith not.

NORMAN J. HOLGATE.

Subscribed and sworn to before me this 23d day of May, 1913.

[Seal]

E. O'NEILL,
Notary Public. [4]

[**Return of Trustee in Bankruptcy Re Sale of Real Estate.**]

*In the District Court of the United States for the
Central Division, District of Idaho.*

IN BANKRUPTCY.

In the Matter of **FRANK M. PINDEL**,
Bankrupt.

RETURN OF SALE OF REAL ESTATE.

To the Hon., the District Court of the United States for the Central Division, District of Idaho, the undersigned Trustee in Bankruptcy of the estate of Frank M. Pindel respectfully reports and makes return to the Court of his proceedings under an order of sale issued to him by said Court, directing him to sell the real estate of the said bankrupt, and to report the same and file his account with the Referee in Bankruptcy. He now so reports and would cause the Court to know and be informed:

That pursuant to said order, a copy of which and the petition upon which the same was based are hereto attached, marked respectively Exhibit "A" and Exhibit "B," and made a part hereof as fully as if here written in full, he caused notice of the sale of the real estate in said petition described to be published in "The Nez Perce Herald," a weekly newspaper published at Nez Perce, Lewis County, Idaho, and in general circulation in Lewis County, in the State of Idaho, in which county the said land is situated, for five weeks successively, to wit; from and including March 6th, 1913, to and including April

3d, 1913, a copy of which notice as so published, together with the affidavit of the publisher of the said paper is hereto attached, marked Exhibit "C" and made a part hereof as fully as if here written in full. Also on the sixth day of March, 1913, the undersigned securely posted in plain sight in three of the most public places in Lewis County a plainly written typewritten copy of notice of said sale, a copy of which typewritten notice with the affidavit of such posting is hereto attached, marked Exhibit "D," and made a part hereof as fully as if here written in full. [5]

That pursuant to said order and said notice of time, place and terms of said sale, the undersigned Trustee at the time and place in said notices mentioned, to wit, at 10 o'clock A. M. of April 5th, 1913, at the front door of the Lewis County District courtrooms (Nez Perce Opera-house Building in Nez Perce, Idaho, being the place where the District Court in and for Lewis County was holding, or had held its last term of court), the undersigned in person appeared and publicly in a loud voice to many persons already assembled announced the sale of said land at public auction, reading the said order directing the sale by the undersigned and the notice of said sale so published and posted, describing the lands and announcing the terms of sale.

The first bid made was \$6000.00. Numerous bids were made by those present and ample opportunity given to all desiring to purchase to make their bids. After all bidding had ceased and all persons had had full and ample opportunity to bid for said land the undersigned after announcing in a loud voice

slowly three times that the land was going at \$10,500, the highest sum bid. The land was then struck off to and publicly announced as sold to Orville M. Collins for the sum of \$10,500.00. The said Orville M. Collins' said bid of \$10,500.00 was the highest and best bid made, and no bid equalling or exceeding that was made at any time.

At the time of so striking off said land to said Orville M. Collins he paid to this Trustee ten per cent of the purchase price, \$1050, pursuant to the terms of sale announced in the notice. That said sale was legally made after notice and was fairly conducted; that said sum so bid is largely in excess of the appraised value of said property and is the full cash value thereof.

That the expenses of said sale were as follows:

Publishing notice of said sale in "The Nez Perce Herald" 5 weeks consecutively from and including March 6th, 1913, to and including [6] April 3d, 1913.....	\$12.35
Trip to Nez Perce, Idaho, place of sale, from Culdesac, Idaho, and posting notice of said sale on March 5th and 6th, 1913, at said Nez Perce, at Vollmer, Idaho, and Ilo, Idaho, three of the most public places in Lewis County, Idaho, in which county said land is situated, and return fare....	3.70
Also hotel bill and board on said trip.....	3.50
Round trip fare Culdesac to Nez Perce and return	3.70
Board and room April 4, 5 and 6, 1913, in at-	

tending sale of the real estate at Nez

Perce, Idaho, on April 5th, 1913..... 4.75

All the property to be sold of said estate consisted of real estate. A large amount of personal property was taken by this Trustee as well as the real estate, as appears by the Inventory and Appraisement on file, and the question of what property belonged to the bankrupt's estate and could be sold, both as to the personal property and real estate, was contested by the bankrupt and his wife. A number of hearings were involved in the questions before the Referee in Bankruptcy. An adjudication by the United States District Court for the Central Division, District of Idaho, was sought and obtained and a revision of that decision was petitioned for by the said bankrupt and his wife, Sarah E. Pindel, and resulted in the affirmance of the decision of the District Court in the determination that the personal property was exempt to Sarah E. Pindel, and the real estate should be sold on failure for 30 days to pay into court the sum of \$4,000, awarding to the Trustee his costs in the Circuit Court of Appeals in the sum of \$285.70 against the said bankrupt and his wife, Sarah E. Pindel, for which execution might be had.

And whereas the entire expense incurred in the handling of said estate was the result of the litigation by the said bankrupt and his wife, Sarah E. Pindel, resulting in the direction of the Hon. District Court of the United States for the Central Division, [7] District of Idaho, affirmed by the Circuit Court of Appeals, awarding costs to this Trustee and directing the sale of the real estate as

aforesaid: This Trustee therefore presents herewith the expenses of the holding of said property and the expense of the litigation before the Referee and said courts in resisting the sale of the land as constituting an expense in the sale thereof, the entire estate of the bankrupt, and reports the same as follows:

In the said litigation it was necessary to employ counsel in the numerous hearings before the Referee and in the United States District Court aforesaid and in said Circuit Court of Appeals, and this Trustee has been charged by his counsel in this matter the sum of.....\$610.00

In preserving the personal property from being taken away, dissipated or lost, it was necessary to employ a keeper of the personal property. In spite of daily care two of the ten hogs were taken by the said bankrupt and his wife and sold to butchers. To such keeper there was paid up to the time of the decision in the Circuit Court of Appeals the sum of \$433.00 and said keeper claims the further sum of \$254.00.....\$433.00

In appraising the taking over the property and in the said hearings before the Referee, your Trustee expended labor and a large amount of time as follows:

Trip from Culdesac to Vollmer and return

railway fare, October 6th and 10th, 1910.\$ 2.30

Team hire taking appraisers from Vollmer to

land and place where personal property was, October 7, 1910.....	\$ 2.50
Four days' time attending to appraising, meeting with great delays and opposition from the bankrupt.....	\$12.00
Board and lodging 4 days.....	\$ 5.85
Hearing before Referee at Lewiston, Idaho, Dec. 30, 1910, one day.....	\$ 3.00
Train fare Culdesac to Lewiston and return..	\$ 1.30
[8]	
Board and room Dec. 31, 1910—Jan. 1, 1911..	\$ 1.90
Jan. 1st, trip from Culdesac to Vollmer and return to look after stock lost, returning Jan. 7th, 1911.....	\$ 1.30
To 5 days' labor looking for stock taken and sold by the bankrupt and his said wife..	\$15.00
Feb. 24, 1911, attending and testifying before Referee hearing at Lewiston, Idaho, 1 day and round trip fare.....	\$ 4.30
Board and room Feb. 24-25, 1911.....	\$ 1.90
March 4, 1911, attending hearing before Ref- eree	\$ 3.00
March 4, 1911, expense involved, fare round trip \$1.30 and room and board \$1.90....	\$ 3.20
There was also further expenditure in the pay- ment of appraisers and witnesses as follows: The en- tire litigation being instituted and carried forward by the bankrupt and said Sarah E. Pindel, his wife, in claiming all property as nonsalable and exempt as against the Trustee, to wit:	
Oct. 14, 1910. Cash to Gus L. Fisher, apprais- er's fee	\$ 6.30

Oct. 27, 1910.	Cash to Wm. H. Abel, appraiser's fee	\$ 7.70
Dec. 31, 1910.	Cash to Chas. S. Boren for taking and transcribing evidence of Bankrupt and witnesses.....	\$ 8.45
Feb. 24, 1911.	Cash to W. L. Lyons, witness fees, coming from Vollmer, Idaho, 45 miles each way, 1 day.....	\$ 7.10
Feb. 25, 1911.	Cash to Charles S. Boren for 1/2 of Stenographer's bill taking of evidence	\$80.00
Feb. 25, 1911.	Cash to E. M. Newbill, witness fees, one day, and mileage from Ilo to Lewiston, 45 miles each way.....	\$ 4.00
Feb. 25, 1911.	Cash to Wm. H. Gage, witness fees, one day, mileage from near Genesee, mileage 15 miles each way.....	\$ 5.50
Feb. 25, 1911.	David Schwark also attended as a witness coming on his expense from Vollmer, being keeper or custodian of the bankrupt's property and no witness fees charged. [9]	
March 4, 1911.	Cash to E. M. Newbill, witness fees, one day, and mileage coming from Ilo, 45 miles each way.....	\$ 6.50
March 6, 1911.	Cash to Chas. S. Boren, balance of stenographer's fees taking and transcribing testimony	\$ 8.20

This Trustee therefore prays that said sale be confirmed, and that conveyance be ordered issued to said purchaser on the payment of the balance of said purchase price; and from the \$5,000 involved in said

homestead right of the bankrupt and Sarah E. Pindel there be ordered deducted, 1st, the direct expenses of said sale the first five items above mentioned, \$28.00, together with said court costs, \$285.70, with interest thereon from Feb. 13th, 1912, making \$337.60, and, 2d, the balance of said sums expended in the litigation caused by the bankrupt and his wife in hindering and delaying all efforts of the Trustee to dispose of property for the benefit of the creditors, holding all as exempt and not subject to the claims of creditors making the additional sum of \$1,234.30, or a total of \$1,571.90 and the balance of said \$5,000, or \$3,428.10, be ordered paid by this Trustee to said bankrupt and wife, and that the balance of said \$10,500 over said \$5,000 be ordered distributed in payment first of fees and commissions of Referee and Trustee and the balance to the creditors of said estate of said bankrupt, and the estate closed, there being no other property to be administered upon.

NORMAN J. HOLGATE,

Trustee of Estate of Frank M. Pindel, Bankrupt.

State of Idaho,

County of Nez Perce,—ss.

Norman J. Holgate, being first duly sworn, on his oath says that he is the Trustee in Bankruptcy of the Estate of Frank M. Pindel and that he has signed the foregoing report as such Trustee. That he has heard read said report, knows the contents thereof, and that the statements therein contained

he believes to be true. [10]

Farther affiant saith not.

NORMAN J. HOLGATE,

Subscribed and sworn to before me this 23d day of April, 1913.

[Seal]

E. O'NEILL,

Notary Public in and for Nez Perce County, Idaho.

Exhibit "A." Same as ORDER OF SALE, page 1. [11]

**[Exhibit "B"—Petition for Order Directing Trustee
to Sell Property, etc.]**

*In the District Court of the United States for the
Central Division, District of Idaho.*

IN BANKRUPTCY.

In the Matter of FRANK M. PINDEL,

Bankrupt.

Respectfully represents Norman J. Holgate, Trustee of the estate of said bankrupt, that heretofore the said District Court of the United States, by its decision, rendered in said cause on the 20th day of May, 1912, made and entered, directed that the real estate, to wit, Lots numbered one (1), two (2), three (3) and four (4) of Section thirty-four (34), and lots numbered twenty-nine (29) thirty (30), thirty-one (31) and thirty-two (32) of Section twenty-seven (27) in township thirty-four (34), North of Range one (1), West of the Boise Meridian, one hundred and sixty (160) acres, subject to the claim of homestead under the laws of the State of Idaho, in the

sum of Five Thousand (\$5,000.00) Dollars, should be, unless the bankrupt should within thirty (30) days after the rendition of said decision, pay to the Trustee the sum of Four Thousand (\$4,000.00) Dollars, the value over and above said \$5,000.00 of said real estate, that the same should be sold by the Trustee, freed from said exemption and the proceeds applied in the satisfaction of the claims of creditors of said bankrupt.

The said decision having been certified for review to the Circuit Court of Appeals of the United States for the Ninth Circuit and the said decision having been affirmed and more than 30 days having now passed since said affirmance and said \$4,000.00 not having been paid, your petitioner, as Trustee of said estate, asks that an order be now issued, authorizing and directing him to proceed at once and sell the said property at public auction, accepting of no bid less than \$5,000.00 and on the sale of said property, that \$5,000.00 of the [12] proceeds, less the costs and expenses of review in the U. S. Circuit Court of Appeals, be paid to the said bankrupt and Sarah E. Pindel, his wife, in lieu of their homestead exemption in said property, and the balance to be reported for payment of fees and expenses and creditors' claims, all pursuant to the said decision of the said District Court.

NORMAN J. HOLGATE,
Trustee. [13]

Exhibit "D"—Notice of Sale of Real Estate.

*In the District Court of the United States for the
Central Division, District of Idaho.*

In the Matter of FRANK M. PINDEL,
Bankrupt.

Notice is hereby given that in pursuance of an order of the Referee in Bankruptcy for the above-entitled court, made on the first day of March, 1913, in the matter of the estate of Frank M. Pindel, Bankrupt, the undersigned, the Trustee in Bankruptcy of said estate, will sell at public auction to the highest bidder, for cash, lawful money of the United States of America, and subject to confirmation by the said Court, at the front door of the Lewis County District courtrooms (Nez Perce Opera-house Building in Nez Perce, Idaho, being the place where the District Court in and for Lewis County now is holding or will have held its last term of court), on Saturday, the fifth day of April, 1913, at ten o'clock A. M., all the right, title and interest of the said Frank M. Pindel, bankrupt, and all the right, title and interest of the heirs of the said Frank M. Pindel, bankrupt, in and to those certain lots, pieces or parcels of land situated in the county of Lewis, State of Idaho, and more particularly described as follows, to wit:

Lots numbered one (1), two (2), three (3), and four (4), of Section thirty-four (34), and Lots numbered twenty-nine (29), thirty (30), thirty-one (31) and thirty-two (32), of Section twenty-seven (27), in Township thirty-four (34), North of Range one

(1), West of the Boise Meridian, One Hundred and Sixty (160) acres.

Terms and conditions of said sale, cash, lawful money of the United States, ten per cent of the purchase money to be paid to the said Trustee on the day of the sale, and the balance on [14] confirmation of the sale by the Court.

Dated and signed this 5th day of March, 1913.

NORMAN J. HOLGATE,
Trustee in Bankruptcy of the Estate of Frank M.
Pindel, Bankrupt. [15]

**[Affidavit of Norman J. Holgate Re Posting of
Notice of Sale, etc.]**

*In the District Court of the United States for the
Central Division, District of Idaho.*

IN BANKRUPTCY.

In the Matter of FRANK M. PINDEL,
Bankrupt.

AFFIDAVIT.

State of Idaho,
County of Nez Perce,—ss.

Norman J. Holgate, being first duly sworn, on his oath states: That on the fifth day of March, 1913, he posted upon the Opera-house at Nez Perce, Idaho, in plain view of passers-by upon the street, a full and true copy of the annexed Notice of Sale of Real Estate, securely fastening the same so it would permanently remain so posted until the day of sale; and on March 6th, 1913, he posted at the front of the post-office in the village of Vollmer, and also at the front

of the postoffice of the village of Ilo, both in Lewis County, Idaho, in each place a full and true copy of the annexed Notice of Sale of Real Estate, said notice in each instance being placed in view of the passing public and securely fastened so as to probably remain in place until the day of sale; that said three notices so posted were posted in three of the most public places of Lewis County, the county in which the land noticed to be sold is situated; affiant is the Trustee of said estate, and over the age of twenty-one years.

Farther affiant saith not.

NORMAN J. HOLGATE.

Subscribed and sworn to before me this 23d day of April, 1913.

[Seal]

E. O'NEILL,

Notary Public in and for the County of Nez Perce,
Idaho. [16]

Exhibit "E"—Excerpt from "Nez Perce Herald"
Re Notice of Sale of Real Estate.]

THE NEZ PERCE HERALD.

VOL. 16, No. 30.

NEZ PERCE, IDAHO, THURSDAY.
MARCH 6, 1913.

* Printed Notice of Sale of Real Estate same as Exhibit "D."

[Endorsed]: Filed May 23, 1913. A. L. Richardson, Clerk. [17]

[Opinion Re Claim of D. F. Wolgamott, etc.]

*In the United States District Court for the District
of Idaho, Central Division.*

In the Matter of FRANK PINDEL,

Bankrupt.

**MEMORANDUM DECISION ON CLAIM OF D.
F. WOLGAMOTT FOR COMPENSATION
FOR SERVICES FOR MAKING RECORD
OF TESTIMONY.**

June 10, 1914.

DIETRICH, District Judge:

The facts in this matter may be briefly stated. The bankrupt interposed objections to the allowance of the claim of the Bank of Nez Perce against the estate. A hearing was ordered, and the parties requested the claimant, D. E. Walgamott, to take the testimony. Apparently he was not a stenographer, for the testimony was typewritten as it was given. An original copy was made for the referee, and two carbon copies were made, one for counsel upon either side. Apparently the only understanding as to the rate of compensation was that it should be reasonable. Each party was to pay one-half the amount thereof. The hearing extended over the period of twenty-nine days, and the testimony written down aggregates 2050 folios. When the hearing was completed Wolgamott presented to the bank a bill for \$256.25, the charge being at the rate of fifteen cents per folio for the original copy, and five cents per folio for each carbon copy. The bank having declined to pay that

amount, the claimant brought suit against it in the Probate Court of Lewis County, his claim there being for \$435.65, upon the basis of a charge of twenty-two and one-half cents per folio for the original, and ten cents per folio for each of the copies. Upon application by the bank to this Court, a temporary restraining order was issued, enjoining the claimant [18] from proceeding in the State court, but before a final hearing could be had upon the question of the propriety of such injunction, the parties have stipulated that the suit in the Probate Court may be dismissed, and that the claimant's compensation may be determined in this proceeding, and, as I understand, the question has now been submitted for decision upon the record as heretofore made.

Strictly speaking, there is no statute to which the question can be referred. In subdivision 5 of Section 38 of the Bankruptcy Act, it is provided that a referee may, under certain circumstances, authorize the employment of a stenographer, at the expense of the estate, "at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings." So far as I am aware, there is no other statutory provision, and this one has no application except by analogy. It contemplates compensation to a stenographer who takes the proceedings in shorthand and then transcribes his notes, and the maximum compensation for such service which can be allowed is at the rate of ten cents per folio. Plainly the services of a typewriter operator do not command as high a compensation as those of a stenographer. There are comparatively few competent court sten-

ographers, but many skilled operators, and court reporting is highly compensated because it requires an unusual degree of skill. It does not appear why the parties did not secure the services of a stenographer in this case. The hearing extended over an unusual period of time, the average amount written daily being only about seventy folios. I am inclined to think that compensation at the rate of \$10.00 per day for the services rendered would be fair. Probably such services could be employed for a smaller compensation, but inasmuch as the parties did not see fit to make a definite agreement, I shall resolve such doubt as I have in favor of the claimant. The total compensation, therefore, which the claimant is entitled to receive is \$290.00, [19] one-half of which, or \$145.00, is, in accordance with the agreement, to be paid by the bank. The bank is therefore directed to pay to the claimant, D. E. Wolgamott, the sum of \$145.00, he to give a receipt in full.

[Endorsed]: Filed June 10, 1914. A. L. Richardson, Clerk. [20]

[Opinion Re Account of Trustee.]

In the Matter of FRANK M. PINDEL,

Bankrupt.

**MEMORANDUM RELATIVE TO ACCOUNT OF
TRUSTEE.**

June 11, 1914.

DIETRICH, District Judge:

There was submitted together with the claim of the Bank of Nez Perce and the question of the sale of the

real estate an informal account of the trustee for moneys disbursed. The theory upon which this account seems to have been presented was that if the bankrupt could be advised of the total amount of the valid claims against the estate, including expenses of administration, he might be able to procure the funds with which to pay all of the indebtedness, and thus avoid the necessity of selling the land constituting the homestead. My first impression was that possibly I could with propriety pass upon the validity of the several items, but upon reflection I have reached the conclusion that the account ought to be presented in a formal way, and an opportunity given to creditors to object thereto. As is said in Collier on Bankruptcy (9th ed.), at page 664, in speaking of trustee's accounts: "Accounts are usually submitted to creditors at meetings called for that purpose, and if passed by them are approved." I have therefore decided to reverse the order of the referee, without prejudice to a consideration of the trustee's account when the same is formally presented and a hearing relative thereto brought on in the regular way. In order that there may be no misunderstanding, it is proper to say at this time that the claim of the trustee for reimbursement for expenses incurred by him cannot be made a charge upon [21] the \$5,000.00 exemption of the bankrupt. Such claims of the trustee as may ultimately be held to be valid are charges only against the estate, and the exempt property is no part of the estate, and is not subject to administration.

It should further be added that the trustee's accounts have no necessary relation to his right, such

as he may have, to recover from the bankrupt and his wife expenses of litigation to which they have been unsuccessful parties. A trustee's account involves a relation only between the trustee and the estate, and not between the trustee and third parties. If the trustee has properly paid out any money on account of litigation upon behalf of the trust estate, he is entitled to reimbursement, even though the estate may not be entitled to recover the amount of such disbursement from the other party to the litigation. It seems that in the Circuit Court of Appeals, in the matter that was taken there for review, the trustee was awarded costs to the amount of \$285.70. If he paid out this amount of money on account of such litigation, he is entitled to reimbursement from the estate for the amount thereof, and in turn, as trustee of the estate, he is entitled to recover that amount from the unsuccessful parties to the litigation, provided they have property subject to process. Their exempt property is, of course, not subject to process. Because of some apparent confusion, I desire to emphasize the fact that in his relation to other parties to litigation, the trustee stands like any other litigant. If he is successful and is awarded the costs, he may recover such costs for the benefit of the estate, but in all proper litigation in which the trustee is involved, as trustee of the estate, he is entitled to be reimbursed from the estate for his expenses reasonably incurred, whether he be successful or unsuccessful; and, of course, as to third parties he is subject to the same limitations, and must comply with the law and the rules the same as any other litigant,

if he would recover from them the costs of suit. [22]

Apparently there is no money in the hands of the trustee, and indeed there has been very little with which to pay expenses. It is to be inferred that the Bank of Nez Perce, the largest creditor, has advanced some money for expense of litigation, etc. To what extent, if at all, the trustee can make claim for reimbursement on account of such expenditures is left for future consideration; that is to say, the trustee may present his accounts, and the whole matter—what amount can properly be allowed, and upon account of what expenditure—is left for the consideration, first, of the creditors, and thereafter of the referee, and thereafter, if any party is dissatisfied, of the Court, upon petition for review. It is, of course, desirable that no unnecessary expense be incurred in a hearing upon the justness or validity of such claims as may be presented by the trustee, and in so far as the evidence already taken is permanent and material, the parties to any controversy can doubtless agree that it shall be used, without the necessity of taking it over again, but the account be presented anew, and in sufficient detail so that it may be easily understood, and, so far as possible, accompanied by vouchers for actual expenditures.

It may not be improper to suggest that if moneys come into the hands of the trustee available for the purpose of paying the expenses of administration, the referee could at once, and without a hearing, direct the trustee to pay to his counsel a fair amount upon account. Apparently counsel have rendered services covering a considerable period of time without any

compensation whatsoever. Such payment could be made without foreclosing the question as to what shall ultimately be allowed as compensation in full. It is to be hoped that the estate may be brought to a speedy close, including the settlement of the trustee's accounts and the payment of all valid claims on account of expenses of administration.

[Endorsed]: Filed June 11, 1914. A. L. Richardson, Clerk. [23]

In the Matter of FRANK M. PINDEL,
A Bankrupt.

Praeceptum for Additional Transcript.

The bankrupt requests the clerk of the above-entitled court to certify to the United States Circuit Court of Appeals for the Ninth Circuit the following, to wit:

The two opinions, or orders, of the above United States District Court, made and entered subsequent to the opinions and orders of June 3d, 1914; the order of sale of the homestead of the bankrupt, and the notice of sale and the proof thereof, the order of sale made by the Referee and on which the homestead was sold.

BEN F. TWEEDY,
Attorney for Bankrupt.

[Endorsed]: Filed July 8, 1914. A. L. Richardson, Clerk. [24]

**[Certificate of Clerk U. S. District Court to
Additional Transcript of Record.]**

*In the District Court of the United States for the
Central Division, District of Idaho.*

In the Matter of FRANK M. PINDEL, Bankrupt.

I, A. L. Richardson, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing transcript of pages from 1 to 25, inclusive, contain true and correct copies of original Order of Sale, Return to Order of Sale, Memorandum Decision on Claim of D. E. Wolgamott, filed June 10th, 1914, Memorandum Decision Relative to Account of Trustee, filed June 11, 1914, and Praecipe, filed July 8th, 1914, in the above-entitled matter as the same appear of record and on file in my office.

I further certify that the cost of the record amounts to the sum of \$12.70, and that the same has been paid by the bankrupt.

WITNESS my hand and the seal of said Court affixed at Boise, Idaho, this 11th day of July, 1914.

[Seal]

A. L. RICHARDSON,

Clerk. [25]

[Notice of Filing of Petition for Revision, etc.]

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

In the Matter of the Bankruptcy of FRANK M.
PINDEL,

A Bankrupt.

NOTICE AND PROOF OF SERVICE OF THE
NOTICE AND OF THE PETITION FOR
REVIEW.

Whereas, heretofore, on the 3d of June, 1914, the Honorable United States District Court for the District of Idaho, Central Division, rendered and entered an opinion and orders reversing and vacating the orders of the Honorable Referee, in the matter of the bankruptcy of Frank M. Pindel, a bankrupt, and affirming the sale, heretofore made by the trustee of the homestead of the bankrupt, and allowing the claim of the Bank of Nez Perce, and the bankrupt, Frank M. Pindel, being aggrieved thereby because of error of law;

Whereas, the bankrupt, Frank M. Pindel, has prepared his petition for review on matters of law by the above-entitled court, making the opinion and orders of the above United States District Court, and the findings of fact, opinion, and orders of the Hon. Referee, a part thereof, to show to the above-entitled court the facts and the holdings and orders of the said United States District Court to be reviewed on questions of law, and thereupon stating in said petition the errors of law complained of by the said bankrupt:

Now, therefore, you, Bank of Nez Perce, and you, Eugene O'Neill, its attorney, and you, Finis Bently, and you, Norman J. Holgate, and you Finis Bently, his attorney, are hereby notified that the bankrupt, Frank M. Pindel, has forwarded the said original petition and a certified transcript, to be filed together, and the \$25.00 deposit, to the clerk of the United

States Circuit Court of Appeals for the Ninth Circuit, and the said petition and the said certified transcript and the said orders and decisions mentioned in the said petition will be immediately filed by the said clerk of said court, and the record printed and copies thereof will be distributed by the said clerk to each of you as required by the rules of the said court.

EDWIN H. WILLIAMS,
BEN F. TWEEDY,

Attorneys for Bankrupt, Frank M. Pindel.

State of Idaho,
County of Nez Perce,—ss.

Ben F. Tweedy, being first duly sworn, upon his oath says that on the 27th day of June, 1914, he served the foregoing notice and the petition for review mentioned therein upon the Bank of Nez Perce and upon Finis Bently and upon Norman J. Holgate, the Trustee, by delivering a copy of the aforesaid notice and a copy of the foregoing petition, omitting the certified transcript and a copy of the orders of the United States District Court and of the Referee, personally to Eugene O'Neill, and by leaving a copy thereof in the law office of Finis Bently with Lawrence O'Neill for the said Finis Bently, in Lewiston, Idaho; that affiant is a citizen of the United States and of Idaho, and at the time of the foregoing service of said notice and petition was over twenty-one years of age, and a resident and elector of Idaho.

BEN F. TWEEDY.

Subscribed and sworn to before me this 27th of June, 1914.

[Seal]

D. J. NEEDHAM,

Notary Public, Residing at Lewiston, Idaho.

[Endorsed]: No. 2439. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Bankruptcy of Frank M. Pindel, a Bankrupt. Notice of Filing Petition and Record, and Proof of Service of Notice and Petition. Filed Jun. 30, 1914. F. D. Monckton, Clerk.

[Endorsed]: No. 2439. United States Circuit Court of Appeals for the Ninth Circuit. Frank M. Pindel, Petitioner, vs. Norman J. Holgate, as Trustee in Bankruptcy of the Estate of Frank M. Pindel, Bankrupt, and the Bank of Nez Perce, Respondents. In the Matter of Frank M. Pindel, Bankrupt. Additional Transcript of Record in Support of Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, Certain Orders of the United States District Court for the Central District of Idaho.

Received and filed July 17, 1914.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

6

No. 2439

United States
Circuit Court of Appeals

For the Ninth Circuit.

FRANK M. PINDEL,

Petitioner,

vs.

NORMAN J. HOLGATE, as Trustee in Bankruptcy
of the Estate of FRANK M. PINDEL,
Bankrupt, and the BANK OF NEZ PERCE,

Respondents.

Additional Transcript of Record on
Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
Law, Certain Orders of the United States
District Court for the Central
District of Idaho.

Filed

SEP 21 1914

F. D. Monckton,
Clerk.

No. 2439

United States
Circuit Court of Appeals

For the Ninth Circuit.

FRANK M. PINDEL,

Petitioner,

vs.

NORMAN J. HOLGATE, as Trustee in Bankruptcy
of the Estate of FRANK M. PINDEL,
Bankrupt, and the BANK OF NEZ PERCE,

Respondents.

Additional Transcript of Record on
Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
Law, Certain Orders of the United States
District Court for the Central
District of Idaho.

INDEX TO THE PRINTED TRANSCRIPT OF
RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys.]

EUGENE O'NEILL, Lewiston, Idaho,
Attorney for Respondent, Bank of Nez
Perce.

BEN F. TWEEDY, Lewiston, Idaho,
Attorney for Bankrupt, Frank M. Pindel.

FINIS BENTLEY, Lewiston, Idaho,
Attorney for Norman J. Holgate, Trustee.

Bankrupt's Exhibit 23.

*In the District Court of the United States for the
Northern Division, District of Idaho.*

IN BANKRUPTCY.

In the Matter of FRANK M. PINDEL,
Bankrupt.

[Affidavit of Douglas V. Dowd.]

At Nez Perce, in said District of Idaho, on the 8th day of February, A. D. 1911, came Douglas V. Dowd, of Nez Perce, in the County of Nez Perce, and State of Idaho, as Cashier of the Bank of Nez Perce, and made oath and says: That he is the Cashier of the Bank of Nez Perce, a corporation incorporated by and under the laws of the State of Idaho, and carrying on business at Nez Perce, in the County of Nez Perce and State of Idaho, and that he is duly authorized to make this proof by said Bank of Nez Perce, and says that the said Frank M. Pindel, the person by whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition and still is justly and truly indebted to said

Bank of Nez Perce in the sum of Thirty-nine Hundred Twelve and 14/100 (\$3,912.14) Dollars, that the consideration of said debt is as follows, monies borrowed from time to time of said Bank and for which a note was given since reduced to judgment in the sum of \$5,382.28 including costs, that no part of said judgment has been paid (except \$1956.25), the said judgment was entered in a case wherein said Bank of Nez Perce was plaintiff and said Frank M. Pindel and Sarah E. Pindel were defendants, upon a joint note executed by them to said Bank of Nez Perce, that there are no offsets, or counterclaims to the same and that said corporation, Bank of Nez Perce, has not, nor has any person by its order to the knowledge or belief of deponent had or received any manner of security for said debt whatever. [1*]

DOUGLAS V. DOWD, (Seal)

As Cashier of said Bank of Nez Perce, a Corporation.

Subscribed and sworn to before me this 8th day of February, A. D. 1911.

[Seal]

THOMAS M. ROBERTS,

Notary Public in and for Nez Perce County, in the State of Idaho.

My notarial commission expires Dec. 24, 1914. [2]
In the District Court of the United States for the Northern Division, District of Idaho.

IN BANKRUPTCY.

In the Matter of FRANK M. PINDEL,

Bankrupt.

*Page-number appearing at foot of page of original certified Record.

To Eugene O'Neill, of Lewiston, Idaho.

I, Douglas V. Dowd, as Cashier of Bank of Nez Perce, of Nez Perce, in the County of Nez Perce and State of Idaho, being duly authorized, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the Court for holding such meeting, or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as after there may be occasion, for me and my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the Court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payments of dividends and of money due me under any composition, and for any other purpose in my interest [3] whatsoever, with full power of substitution.

In witness whereof I have hereunto signed my

name and affixed my seal the 8th day of February,
A. D. 1911.

DOUGLAS V. DOWD, (Seal)

As Cashier of Said Corporation.

Signed, sealed and delivered in presence of

THOMAS M. ROBERTS,

Acknowledged before me this 8th day of February,
A. D. 1911.

[Seal]

THOMAS M. ROBERTS,

Notary Public in and for Nez Perce County, in the
State of Idaho.

[Endorsed]: In the District Court of the United
States for the Northern Division, District of Idaho.
In the Matter of Frank M. Pindel, Bankrupt. In
Bankruptcy. Filed the 9th day of February, A. D.
1911, at 5 o'clock P. M. G. Orr McMinimy, Referee.
"Bankrupt's Exhibit Twenty-three" for Identifica-
tion. Admitted in Evidence. G. Orr McMinimy,
Referee. [4]

*In the District Court of the Second Judicial District
of the State of Idaho, County of Nez Perce.*

BANK OF NEZ PERCE,

Plaintiff,

vs.

F. M. PINDEL and SARA E. PINDEL,

Defendants.

Judgment on Verdict.

This day this action came on regularly for trial,
the said parties appeared by their attorneys, E.

O'Neill, counsel for the plaintiff, and I. N. Smith for the defendants. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel and instructions of the Court, the jury retired to consider their verdict and subsequently returned into court, with the verdict signed by the foreman, and, being called, answered to their names, and say:

We, the jury, duly sworn and impaneled to try the above-entitled cause, for our verdict say: that we find in favor of the plaintiff and against the defendants, F. M. Pindel and Sara E. Pindel in the sum of \$3,635.16.

CHARLES HILL,

Foreman.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged that said plaintiff have and recover from said defendants the sum of Thirty-six Hundred Thirty-five 16/100 Dollars, with interest thereon at the rate of seven per cent per annum from date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action amounting to the sum of Seventeen Hundred Forty-seven and 12/100 Dollars. [5]

WITNESS, Hon. EDGAR C. STEELE, Judge of the Second Judicial District Court, and the hand and

the seal of the Clerk thereof, this 15th day of Feby.,
A. D. 1909.

[Seal]

W. L. GIFFORD,

Clerk.

By C. E. Monteith,

Deputy.

No. 1829. In the District Court of the Second
Judicial District of the State of Idaho, in and for
the County of Nez Perce. Bank Nez Perce, Plain-
tiff, vs. F. M. Pindel and Sara E. Pindel, Defendant.
Judgment on Verdict. Filed the 15th day of Feby.,
A. D. 1909. W. L. Gifford, Clerk. By C. E. Mon-
teith, Deputy. [6]

[Exhibit No. 17] Judgment Docket District Court, Second Judicial District, Nez Perce County, Idaho.

No. of Cause and Page of
Judgment Book
No. 1829 page 199

Judgment Debtor
Pindel, F. M. and
Sara E.

Judgment Creditor
Bank Nez Perce

Items of
Judgment
Judgment
Costs

Amount
Dollars Cents
3635 16
1747 12
5382 28

When Rendered
Month Day Year
Feb. 15 1909

Appeal Taken
Month Day Year

Judgment of Appellate Court

Execution Issued		Execution Returned		Amount Satisfied	
Month	Day Year	Month	Day Year	Dollars	Cents
Mar.	8 1909	Apr. 13	1909	131	50
Dec.	6 "	Apr. 21	1909	1956	25

REMARKS.

Receipt E. O'Neill.
Rec'd & Docketed Feb. 15, 1909.
Amount due \$3478.88.

State of Idaho,
County of Nez Perce,—ss.

I, J. R. Lydon, Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for Nez Perce County, do hereby certify that the above and foregoing, is a full, true and correct transcript of the original Judgment Docket of said District Court, in and for Nez Perce County, in the case of Bank of Nez Perce, Plaintiff, and F. M. Pindel and Sarah E. Pindel, Defendants.

Attest my hand and the seal of said Court this 14th day of June, 1913.

J. R. LYDON, Clerk.
C. E. Monteith, Deputy.

Judgment Docket, Vol. 7, Page 199.

[7]

[Endorsed]: No. 378. Transcript of Judgment Docket from Second Judicial District Court, Nez Perce County, Idaho. F. M. and Sarah E. Pindel, Judgment Debtor. Judgment Docketed ———, 191——. Filed the 28th day of March, 1914. A. L. Richardson, Clerk U. S. District Court.

“Exhibit Seventeen.” Bank of Nez Perce. G. Orr McMinimy, Referee.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2439.

FRANK M. PINDEL,

Petitioner,

vs.

NORMAN J. HOLGATE, as Trustee in Bankruptcy of the Estate of FRANK M. PINDEL, Bankrupt, and the BANK OF NEZ PERCE,

Respondents.

In the Matter of FRANK M. PINDEL,

Bankrupt.

Praeipie for Additions to Transcript of Record.

To the Clerk of the United States District Court,
District of Idaho.

Bank of Nez Perce, one of the respondents above named, hereby requests and directs that you furnish to the Clerk of the above-named United States Circuit Court of Appeals at San Francisco, California, the following portions of the evidence in the above-entitled cause, being portions of the evidence introduced at the hearing or a part of the record made at

the hearing of the said cause before the Referee in Bankruptcy, G. Orr McMinimy, at Ilo, Idaho, and made use of by the said District Court in reviewing the decision of the said Referee at the May, 1914, Term of the said Court, Central Division, District of Idaho, to wit:

1. The affidavit of the printer showing that the Notice of Sale of the real estate was published in the "Nez Perce Herald" from March 6th, to April 3d of year 1913, being exhibit "C" in exhibit "G," Return of Sale of Real Estate by Trustee.

2. The claim of Bank of Nez Perce, being Bankrupt's Exhibit 23.

3. Judgment of District Court of the Second Judicial District of the State of Idaho, in and for Nez Perce County, in case entitled, Bank of Nez Perce, a Corporation, Plaintiff, vs. Frank M. and Sarah E. Pindel, His Wife, Defendants. Copy attached and served herewith for identification. [8]

4. Judgment Docket District Court of the Second Judicial District of the State of Idaho, in and for Nez Perce County, in same case last above mentioned, at page 199 said Judgment Docket. Copy attached, except Clerk's Certificate, and served herewith for identification.

EUGENE O'NEILL,

As Attorney for Respondent, Bank of Nez Perce.

Due service of the foregoing praecipe with exhibits "Judgment" and "Judgment Docket" attached by

copy handed to me this 18th day of August, 1914, at Lewiston, Idaho, is hereby admitted.

BEN F. TWEEDY,

As Attorney for Bankrupt, Frank M. Pindel.

FINIS BENTLEY,

Attorney for Norman J. Holgate, Trustee.

[Endorsed]: Filed Aug. 20, 1914. A. L. Richardson, Clerk. [9]

**[Certificate of Clerk U. S. District Court to
Additional Transcript of Record.]**

*In the District Court of the United States for the
District of Idaho, Central Division.*

In the Matter of FRANK M. PINDEL,
Bankrupt.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the foregoing transcript of pages from 1 to 10, inclusive, contain true and correct copies of Bankrupt's Exhibit 23, Judgment of District Court of the Second Judicial District of the State of Idaho, Judgment Docket District Court of the Second Judicial District of the State of Idaho, Nez Perce County, and Praecipe for Additional Transcript, in the above-entitled matter as the same appear of record and on file in my office.

I further certify that the cost of the record amounts to the sum of \$5.00 and that the same has been paid by respondent, Bank of Nez Perce.

Witness my hand and the seal of said court affixed
at Boise, Idaho, this 20th day of August, 1914.

[Seal]

A. L. RICHARDSON,

Clerk. [10]

[Endorsed]: No. 2439. United States Circuit
Court of Appeals for the Ninth Circuit. Frank M.
Pindel, Petitioner, vs. Norman J. Holgate, as Trustee
in Bankruptcy of the Estate of Frank M. Pindel,
Bankrupt, and the Bank of Nez Perce, Respondents.
Additional Transcript of Record on Petition for Re-
vision Under Section 24b of the Bankruptcy Act of
Congress Approved July 1, 1898, to Revise, in the
Matter of Law, Certain Orders of the United States
District Court for the Central District of Idaho.

Received and filed September 2, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR NINTH DISTRICT

FRANK M. PINDELL,
Petitioner,

vs.

NORMAN J. HOLGATE, as Trustee in
Bankruptcy of the Estate of Frank M.
Pindell, Bankrupt, and the **BANK**
OF NEZ PERCE,
Respondents.

In the Mater of **FRANK M. PINDELL,**
Bankrupt.

BRIEF OF THE PETITIONER.

Edwin H. Williams, of San Francisco, California,
and Ben F. Tweedy of Lewiston, Idaho, Attor-
neys for the Petitioner and Bankrupt.

EUGENE O'NEILL,
of Lewiston,
Attorney for Bank of Nez Perce.

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STATEMENT OF FACTS.

On the 14th of February, 1910, Frank M. Pindell was adjudged a bankrupt. His estate had no other property than the homestead of 160 acres. The stat-

utes of Idaho exempt a homestead to the value of \$5000.00, and provide for execution against the excess over \$5000.00. It is not necessary to indicate the proceedings under the state statutes upon execution against the judgment debtor's homestead.

But since bankruptcy adjudication, the value of homestead has increased very materially. The value of the homestead has increased from Four or Five Thousand Dollars to Fourteen or Fifteen Thousand Dollars.

The Bank of Nez Perce, before it filed its claim against the estate, got into the early proceedings, instituted by the Referee, to sell the homestead and Mrs. Pindell's property, and pushed with all its might with the Trustee to get an order to sell the homestead and Mrs. Pindel's property, without even having its claim allowed against the estate, or filed.

Mrs. Pindel, to save her own property, intervened and removed the early proceedings from the Referee to the United States District Court, where the issues involved were decided.

Quite a while after the adjudication of bankruptcy, and on the 20th of May, 1911, the United States District Court found that the homestead was then of the value of \$9000.00 and that, therefore, the entire 160 acres could not be set

off to the bankrupt as exempt. This adjudication of the District Court need not be set forth in full; for it has been before the Court of Appeals, and was affirmed.

The bankrupt by his then attorneys defended against the sale of his homestead on the ground that it had been partitioned by the state court, and on the ground that it was not of any greater value than \$5000.00.

On December 14, 1910, Mrs. Pindell filed an intervention petition before the referee, claiming the personal property, and, also, the bankrupt objected to any order of sale—see fifth paragraph of cross-petition of Trustee, in No. 1999—and on the 30th day of December, 1910, a hearing was had before the Referee—see same fifth paragraph—but Mrs. Pindel removed the proceedings to the United States District Court by petition in intervention on January 5th, 1911, and further testimony was taken by the Referee on February 24th, 1911, and on May 20th, 1911, the District Court rendered his decision—see paragraph sixth of Trustee's cross-petition, above trans. p. 15.

So, more than one year lapsed, after the petition in bankruptcy was filed and after the adjudication in bankruptcy, before the 20th of May, 1911—the date of the decision of the District Court, when the

value of the homestead was placed at \$9000.00. And from May 20th, 1911, to June, 1913, the value of the homestead had increased from the value of \$9000.00 to Fourteen or Fifteen Thousand Dollars, evidently, as Referee found it had increased from Four or Five Thousand to Fourteen or Fifteen Thousand Dollars during the litigation.

Since, during the life of the litigation, the value of the homestead, as found by the Referee, increased from Four or Five Thousand to Fourteen or Fifteen Thousand Dollars by June, 1913, and the estate had no other property, Frank M. Pindell was a bankrupt if, at the time he filed his petition and at the time of the adjudication that he was a bankrupt, he owed only \$258.50; so it was not necessary for him to schedule the judgment of the Bank of Nez Perce to get the adjudication that he was a bankrupt on the 14th of February, 1910. Consequently he did not get the court to adjudge him a bankrupt when he was not a bankrupt.

But, since the judgment of the bank was not satisfied of record, it was necessary for the bankrupt to schedule it as a judgment unsatisfied of record, so that notice would be forwarded to the bank to make it file the judgment as a claim against the estate, and so that he could be discharged from all personal liability.

The claim had to be filed against the estate before its allowance could be contested, and before it could be allowed, or paid, or become a charge against the estate.

Trustee and the Bank of Nez Perce against the Referee's suggestion that new notices should be given secured an *ex parte* order of sale from the Referee, and sold the homestead to Mr. Collins, president of the Bank of Nez Perce in June, 1913, and even yet the claim of the Bank of Nez Perce was not allowed. Its claim had been filed on the 9th of February, 1911.

Thereupon, the bankrupt, having ascertained what was being done, protested, in writing, against the confirmation of sale, and, at the same time, was permitted by the Referee to defend against the allowance of the judgment of the bank against the estate as a claim to be paid from the proceeds of the homestead, and he asked the Referee to ascertain all liability of the estate so that he could pay the same in full, and have all his debts paid, and his estate settled as a solvent estate—becoming so by the increase in its value.

In this way, the present hearing and controversy were brought on before the Referee. The Referee heard the evidence, permitted witnesses to be examined in chief and cross examined, and occupied prac-

tically a month of his time in June, July and August of 1913, and, upon this great volumn of evidence, introduced before him and heard by him, he made his findings of fact, conclusions of law, and his orders, which were reviewed on matters of law by the United States District Court upon petitions for review filed by the Bank of Nez Perce, by the Trustee and by the Trustee's attorney on his own behalf.

Thus all of them are acting in harmony against the bankrupt, showing the wisdom of the permission given by the Referee to the bankrupt to defend his own estate after it was seen that the Trustee would not do so. These propositions conclusively indicate the position of the Trustee and, in a measure, explain the great delay in the matter of closing the estate and in permitting the claim of the bank to remain so long unadjusted. We shall now state the defenses of estate against bank's claim. The defenses grow out of the proceedings in the state court. The Referee found that the personal property of the bankrupt was attached on or about June 28th, 1908 on the first writ of attachment which was subsequently dissolved, which property so attached, was, when attached, of the reasonable value of \$6522.00; the Referee also found that under private arrangement five attached hogs were sold to a Mr. Morgan for about \$57.00; also

that on order of sale of the District Court some of the attached property was sold for \$131.50, and that the attached property was wasted, destroyed and injured by the sheriff and his keepers, and that the residue which survived or was saved, was sold at execution sale on the 6th of April, 1909, on an execution issued on the 8th of March, 1909, for about \$2000.00; also that Harry Lydon's term of office had expired on the second Monday of January, 1909; also that the judgment was procured on the 15th of February, 1909, in the state court; that Harry Lydon, as the then sheriff of Nez Perce County, attached the personal property which he found to be of the value of \$6522.00 when attached, and without returning the attached property to its owner which had been seized under the first writ of attachment, when the first writ was dissolved, continued in possession of the attached property and held it under the second writ of attachment; also that the bankrupt was in the penitentiary when the first writ was levied on the property and was in the penitentiary continuously until a few days before the execution sale in April, 1909; having been granted a full pardon. By section 4070, Revised Codes of Idaho, therefore, the statutes of limitations did not run against the bankrupt during the period of his disability and

the bank can not be excused from liability because of anything done by bankrupt while in penitentiary.

The sum of \$57.00, \$131.50, and \$2000.00 is \$2188.50. Therefore \$4333.50 is the estate claim against the Bank of Nez Perce. The Referee held that, under the facts, conditions and circumstances, the judgment of the bank could not be allowed as a claim against the estate, since it was either paid and satisfied in full under the rule of law which will be hereafter presented in this brief or was wiped out by the estate's set-off which exceeds the unpaid balance of the judgment very greatly.

The Referee also held that he could not give judgment against the bank in favor of the estate for the excess of the set-off, and the estate, now being represented by the bankrupt by permission of the Referee, agrees with Referee.

For, certainly, no jurisdiction is given by section 68, Bankruptcy Act, 1898, than only on the matter of the allowance of claims, to state the account and to disallow a claim if the estate's set-off equals or exceeds the claim against the estate.

The Referee also held that the total liability of the estate was \$631.56, and disaffirmed the sale of the homestead and gave the bankrupt thirty days within which to pay the same to the Trustee, and thereupon

report final settlement of the estate as a solvent estate, since the value of the homestead had increased so greatly, during the life of the litigation.

The findings of fact, conclusions of law, and the orders of the Referee, in words and figures, are as follows, to-wit:

IN BANKRUPTCY

In the District Court of the United States, in and for
the District of Idaho, Central Division.

In the matter of	
Frank M. Pendel,	
Bankrupt.	

This action came on for hearing on the 14th day of June, 1913, on motion of the trustee, Norman J. Holgate, for an order affirming the sale of certain real estate and the settlement of certain accounts and charges attached thereto and praying that they be charged against the exemptions of the bankrupt and objections of the bankrupt to the same and a petition of the bankrupt for an order allowing or disallowing all claims filed against this estate, showing cause why the claim of the Bank of Nez Perce against the estate should not be allowed and setting up a counter claim against said claim and asking a judgment against the Bank of Nez Perce and praying that after the claims are all passed upon and allowed or disallowed and the amount thereof ascertained and the

expenses of the administration of said estate are settled and fixed that he be allowed to pay off said claims and expenses in full and that these proceedings be then dismissed. To the objections and counter claim set up by the bankrupt the Bank of Nez Perce makes answer. On those issues the matter has been heard and the Referee now renders his decision and makes such orders as he thinks just and proper in the premises.

STATEMENT OF FACTS

After a careful examination of a large mass of evidence introduced before him and the records of the case before him the Referee has found very little conflict considering the length of the litigation involved and in many of these cases he has been able to reconcile them after considering the whole matter. He has been very liberal in his ruling on evidence because there has been a constant claim that the matter has never been considered except by piece meal and he hopes that by having a full and complete hearing at this time that this expensive litigation will be stopped and stopped forever.

It appears that on the 26th day of December, 1907, Frank M. Pendel owed the Bank of Nezperce \$2950.00 on overdrafts; that on that date Mr. Dowd, cashier

of said bank at that time, went to the Pindel homestead and asked Mr. Pendel for a note signed by his wife as an accommodation payor ; that after much argument and persuasion Mrs. Sarah E. Pendel was induced to sign the note, this note was payable on demand.

Pendell was arrested in March, 1908, on a charge of stealing a steer and was taken to Lewiston and tried and found guilty and was taken to the penitentiary in Boise in May of the same year. After the trial Mrs. Pendel, assisted by two boys, went into the Little Canyon and rounded up 178 head of cattle and took them to Kendrick and sold them for \$3831.00. The bank has made serious objection to her making this sale without paying their claim but Mrs. Pendel proves conclusively to me that these cattle were her own personal property.

Mrs. Pendel went to Boise during the month of June of the same year to consult with her husband about securing a pardon and in regard to the settlement of his business affairs. Both Mr. and Mrs. Pendel testify that they talked over the sale of Mr. Pendel's property for the purpose of paying off this note. While she was away the bank brought this action and on the 27th of June had an attachment issued.

When Mrs. Pendel came back from Boise she went to the office of E. O'Neil, attorney for the bank and she and Mr. O'Neil agreed to have the property taken under attachment, sold and the purchase price applied upon the debt; this was on the 10th day of July. Mr. Dowd was called on the phone and told of the agreement and Mrs. Pendel borrowed some stationary from Mr. O'Neill and made a written statement of the terms of the agreement and mailed it to Mr. Dowd (this is creditor's exhibit 19).

Under this agreement five head of hogs were sold by Mr. Dowd to Mr. Morgan on the 14th of July. On the 17th of July Mrs. Pendel called up Mr. Dowd and told him she had a buyer for a small team but Mr. Dowd told her that if she wanted to sell any more she would have to deal with the sheriff.

Mrs. Pendel then secured the services of Attorney I. N. Smith and he filed a demurrer on the 24th of July. The first attachment was quashed and a second attachment was issued on August 13th.

Mrs. Pendel returned again to Boise to take up the matter of the pardon of her husband and in her absence and in the absence of her husband on the 15th of February, 1909, a trial was had and a judgment was entered against the bankrupt and his wife for \$3635.16.

On March the 8th an execution was issued and placed in the hands of Harry Lydon, who had made the attachment as sheriff but whose term of office had expired on the second Monday in January and Harry Lydon sold the balance of the grain and stock remaining in his hands on the 6th day of April, 1909, This execution was returned.

On the 6th day of December, 1909, another execution was issued and under this execution proceedings were had in the Probate Court of Nez Perce County looking to the purpose of having the homestead appraised. An appraisalment was made by three good and disinterested parties; the bank was not satisfied with this appraisalment and they proceeded to ask for another appraisalment. Soon after this the bankrupt filed his petition in bankruptcy in this court and was declared a bankrupt.

The Trustee under the direction of Mr. O'Neil seized a large amount of personal property not scheduled in the bankrupt's petition and without an order of the referee, which said property was afterwards claimed by the bankrupt's wife and as such was set off to her by the judge of this court, which order was affirmed by the circuit court of appeals.

A meeting of creditors was called and duly noticed

for the purpose of passing on the question of selling the real and personal property but before the referee could pass upon the matters presented at this meeting the whole proceedings were removed by a petition in intervention to the judge of this court by Mrs. Pendel. The judge passed upon such matters as were before him and made his order to the trustee of January 5th, 1911, which order was affirmed by the circuit court of appeals.

On the 1st day of March, 1913, a petition was filed by Mr. O'Neil and an ex-parte order signed by this Referee directing a sale of the real estate. A sale was had and upon the motion to confirm this sale these proceedings were had before this referee.

Under the first and void attachment the following property belonging to the bankrupt was taken by the sheriff over and above certain other property afterwards set off as exempt to his wife:

Property	Value
1 Stallion	\$ 700.00
3 Bay mares, weight abaout 1400	900.00
2 Black geldings, weight 1200 each	500.00
1 Brown mare, weight about 1300	250.00
3 small saddle or work horses, weight about 1100	450.00
6 Head cattle, not returned	200.00

19 Head hogs	380.00
110 Acres of oats at \$15.00 per acre	1650.00
35 Acres of timothy	525.00
30 Acres of Indian allotment of oats and wheat	450.00
Hay and grain in barn	100.00
Use of exempt horses while seized and held	102.00
13 Acres of Timothy hay destroyed by pas- turing	195.00
Pasture on the Bunce place	20.00
Total	<u>\$6522.00</u>

There was no return on the first attachment and a small portion of their property was not returned as attached by the sheriff on his return on the second attachment.

The values set opposite the items are taken from the evidence of Mrs. Pendell supported by the evidence of such reliable and well informed witnesses as W. T. Simmons, John McKinna, William Campbell and others.

In addition to this the bankrupt is asking to set up a claim of damages for \$600.00 for the taking of property belonging to Mrs. Pindel which claim I am of the opinion was fully proved and not disproved by the Bank and Mrs. Pindel has agreed to allow this set-off of her claim to be made.

There is no evidence to show that this property was ever returned to the bankrupt or his wife after the dissolution of the void attachment but the cost bill (Bank of Nez Perce exhibit 14 at page 599 trans.) would indicate that none of it ever was.

This property, or all of it that was not destroyed or died, was sold at three sales, one on the 14th of July, 1908, when 5 hogs were sold to Mr. Morgan under the July 10th agreement, one under order of Sept. 18th, 1908, by the district judge of a 2-year old stallion and the balance of the hogs, and one on the 6th day of April, 1909, by Harry Lydon when the grain and the balance of the stock were sold.

The first amounted to about \$57.00, the second to \$131.50 and the last to about \$2000.00. The return on the execution is gone from the record and I can not give the exact figure on this. The amount returned on the last sale is the only amount that has been applied on the judgment (see Judgment docket "aBnk of Nez Perce, Exhibit 17," page 605 trans., Bank's Reply to Answer Brief of Bankrupt page 51, Mr. Dowd's testimony trans. 351).

There was a great amount of grain wasted on the ranch after the attachment and the stock held until the April sale were in very poor condition. Orville M. Collins of Uniontown, Washington, was the pur-

chaser of said stock at said sale and this stock was not in such condition but what they could be restored to normal condition by Mr. Collins by good care and feed before spring work commenced.

The Bank of Nez Perce has gone out of business and this action is continued by its attorney for the benefit of its president, Mr. Collins. This homestead has increased from a value of Four or Five Thousand to Fourteen or Fifteen Thousand Dollars in value during the life of this litigation and Mr. Collins is the purchaser of this land at this sale for \$10,500.00. The value has been proven by such reliable and competent witnesses as Mr. Lyons, Mr. Simmons, and others.

The bankrupt was kept in prison until the spring of 1909 when the Idaho State Board of Pardons found that he had been unjustly convicted and gave him a full pardon. The bankrupt was therefore not present during all of these proceedings in the district court and his wife was left to take care of matters the best way she could.

Claims in the amount of \$258.50 have been proved and allowed in this estate to date.

OPINION.

The Referee has covered the important questions of fact and any others that may occur to him as important in passing upon the many questions before him will be mentioned by him as he proceeds to consider the law in connection with the facts in his opinion and the orders resulting therefrom.

He has read with pleasure the extended briefs of counsel for both sides although his work has been difficult at times owing to the failure of attorneys to make specific reference to page and line of the transcript when they refer to the evidence.

It is unfortunate indeed that so much valuable property should have been wasted in so much litigation and the Referee takes up these matters in the same spirit as the court expresses in his letter (Bankrupt's Exhibit 2 Trans. page 456) when he says that he is ready at all times to do anything within the authority of the law which may be necessary to bring about a settlement of the estate with the least possible loss or sacrifice to any of the parties concerned.

It is my opinion that Mr. Dowd expressed his honest opinion of the criminal proceedings in his letter of July 29, 1908, (Bank of Nezperce's Exhibit 24, Trans. p. 621) in the following words: "You still have the elements of manhood in you, if you are in the pen,

and it is my opinion, and the honest opinion of all acquainted with the case, that you didn' get a square deal" and that he would not have protested against the pardon had he not been so advised for the purpose of making Mrs. Pendel "dig up."

The question of the allowance of the claim of Bank of Nezperce appeals to me as the first for my consideration. In his order of the 20th day of May, 1911, the judge of this court directs the sale of this land subject to my direction. This, I take it, leaves the sale largely in my discretion and I am of the opinion that an order of sale of \$15,000.00 worth of property for the purpose of paying a total of \$258.50 of allowed claims after the time for filing claims had expired, especially for \$10,500.00 to Mr. Collins under the circumstances, thereby making a profit to him of four or five thousand dollars in the transaction, or the confirmation of such a sale, would be an abuse of such discretion and would not exhibit the spirit of the court heretofore spoken of.

Counsel for the bank stoutly maintains that the creditors whose claims have been allowed are entitled to interest but I find no law authorizing such interest and it has not been the practice of the court to allow interest on approved claims after their allowance.

The Bank of Nezperce bases its claim wholly on the judgment obtained in the state district court. As against this the bankrupt claims a set-off of certain damages arising from a void attachment, a breached contract and a void execution sale and prays for a judgment for the difference between the amount of such damages and the amount of the claim proved.

The bank insists that if there were any damages that they were not responsible for the acts of the sheriff and his keepers, that under our statutes and the decisions of our supreme court such damages should have been set up as a counter claim in the State Court and the bankrupt having failed to do so they have become merged in the judgment and are now *res adjudicata*. Otherwise they should be tried out in the state court before a jury maintaining that a jury is a constitutional right.

We might say in passing that a jury is not an unknown quantity in the bankruptcy court and if counsel for the bank had requested one at the beginning of this hearing he could certainly have had one.

Remington on ankrupcty, Sec. 404

The question of set-offs, counter claims and recoupments is covered by Sec. 68a of the Bankruptcy Act of 1898. The term "Mutual Credit" as used in equity means a credit agreed upon by the parties, or arising

out of connected transaction (Story Eq. Jur. Sec. 1435) but in bankruptcy statutes "mutual credits" are extended to mean that the parties are, or in the natural course of events will be, creditors of each other. (Lowell Bankr. Sec. 255). So we see in the beginning that the Bankruptcy Courts are inclined to take a broad view of the question of set-offs, counter claims and recoupments.

The position of the bank as to the merger of all damages in the judgment and therefore *res adjudicata* might be correct if this action had followed the usual course of events, that is if the property taken under a void attachment had been returned to the bankrupt, if there had been no agreement of July the 10th, 1910, and if the property had been retaken and sold at a valid execution sale but this was not the condition of the record.

It seems to me that there is no question but the property sold on the 6th day of April was sold by Mr. Lydon after he had retired from office and under process issued after his term had expired and therefore void.

There is no return on the first attachment and therefore there is nothing to prevent the bankrupt from going behind the attachment and showing the property actually taken by the officer.

This makes the officer a trespasser *ab initio* (4 Cyc. 607). The return, however, if there was one, would not be conclusive (Jefferson County Savings Bank vs. Shorn Ala.) 4 So. 386) and the attaching plaintiff is liable for the damages caused by the officer and his keepers (Kerr vs. Mount. 28 N. Y. 659).

There being a void attachment and no return and no return of the property to the defendant and a void sale under execution there was a continuing damages from the time the first levy was made up and until the sale was made and therefore the defendants right of action did not fully accrue until after judgment and execution and the defense could not have been set up in an answer or in a cross complaint.

Again the bank repudiated the agreement of July 10th, 1908, and the damages from this breach of contract extended over to the time of the final judgment and I therefore cannot find any reason whatever that the bankrupt cannot urge the damages caused by the void attachment, the breach of agreement and the void execution sale.

It might also be said that the judgment has been fully paid and satisfied (17 Cyc. 1395-1396 and notes 44-45-48-49; Banks vs. Evans, 48 Am. Dec. 734; Brown vs. Kidd, 34 Miss. 291).

The attaching plaintiff has levied on \$6522.00 worth of personal property to satisfy a judgment for

\$3635.15 or some \$3,000.00 more than enough to satisfy the judgment. The levy of an attachment or execution on sufficient personal property of the judgment debtor to pay the judgment amounts prima facie to the satisfaction of the judgment (23 Cyc. 1488-1489, Freeman on Judgments, Vol. 2, 4th Ed. pp. 819-820, Sec. 275, p. 817. The amount of personal property is so much greater than the amount of the judgment that it would only be justice and equity to hold that it has been satisfied under the facts in this case.

I agree with counsel for both sides that there has been much litigation since the 24th day of July, 1908, over this matter but that does not excuse the destruction of so much property.

I do not think it necessary to go into the matter of the manner of the assessment of the damages and computing the interest thereon as the set-off is so much greater than the claim and I am unable to find any authority for entering a deficiency judgment against the bank and in favor of the bankrupt.

It was not only the right but the duty of the bankrupt to examine all claims and advise the Referee as to their correctness (ankr. Act. 1898, Sec. 7a (3) and if the Trustee does not contest an unjust claim, as he

has not in this case, it is the privilege of the Bankrupt to do so.

Remington on Bankruptcy Sec. 826.

In this case it is admitted that the claim of the Bank as originally filed was not correct (Bank's Reply Brief to "Answer Brief of Bankrupt" p. 51).

In all that I have said here I have assumed that there was legal service made on the Bankrupt of the Summons in the original case. The Bankrupt denies this and denies the employment of an attorney to represent him in this case. In the hearing in the case before me on the 8th of August the Bank introduced a number of copies of letters which Mr. O'Neil says passed between him and the warden of the penitentiary at the time which tend to show that there was service but the proof is very unsatisfactory at the most.

As to the sale I am of the opinion that the petition for sale should have been filed and notices of a hearing on the same. This would have eliminated the cost of a sale under the circumstances surrounding the one made. At the time the ex-parte order was made the Referee suggested this but counsel for the bank and Trustee maintained that the notice given the creditors of the meeting held in December, 1910, was sufficient. He has evidently changed his mind

as indicated by his filing at the August meeting of waivers of notice of a hearing on the part of certain of the creditors. This would not cure a void sale and especially as to notice to Mrs. Pendel who is as much interested in the sale of her homestead as any one could be.

Blood vs. Munn, (Cal.), 100 Pac. 694.

As to the expense of the Trustee for taking and keeping personal property which was not in the schedules and without an order of the court by doing so the Trustee took this property at his own risk and since this property has been held by the District and Circuit Courts to be property belonging to Miss Pindel I do not feel like taking the expense of taking and keeping this property from the estate of the bankrupt.

Remington on Bankruptcy Sec. ———.

I find no authority for allowing the Trustee a per diem for his work in the case. I can allow his expenses in certain cases but he receives as his compensation for his work a commission and nothing else.

I have examined the claim of the attorney for the trustee very carefully and from the circumstances I find that \$200.00 is a reasonable and sufficient compensation for all work done by him.

Appended to the report of sale is an accounting which under ordinary circumstances would be set out in a final accounting. I do not know why this was done except for the purpose of having the total amount taken out of the homestead allowance of \$5,000.00. This I could not do under the specific directions of the order of the District Judge of May 20, 1911, nor do I find any law for any such proceeding as our statute contemplates that the bankrupt is entitled to the \$5,000.00 exemptions under any and all circumstances and this can not be taken from him either by law or by equity or on equitable grounds as claimed by counsel for the trustee and the bank.

Remington vs. Bank, Sec. 2010.

Neither can I hold that the amount assessed against the bankrupt and his wife in the Circuit Court should be assessed against the exemptions of the Bankrupt or against the estate for the reason just stated.

I would not pass on this account at the present time as the Referee has directed that the original receipts and vouchers be filed by the Trustee or his attorney but now after almost a year has expired this has not been done but the bankrupt has prayed for a settlement in the nature of a composition under the

bankruptcy act and I will do the best I can to adjust the whole matter.

Several of the witnesses whose claims for fees in previous hearing is based on testimony given as to the value of the homestead which was material to the consideration of the case in the upper court, I think should be allowed.

I do not think that the trustee is entitled to pay at \$3.00 per day for hunting hogs belonging to Mrs. Pendel.

The Referee has the power to assess costs against the losing party in this proceeding.

I have been very liberal in my rulings on evidence because I have wanted the whole matter to come before me and there has been a continual complaint that the case has never been tried out as it should be but only by piece meals.

I don not think that the sum of \$10,500.00 is sufficiently large to warrant me in ordering the confirmation of this sale.

Grain and hay raised after adjudication does not become a part of this estate.

Rev. on Bank, Sec. 113.

ORDER.

It is therefore ordered that the claim of the Bank of Nezperce be disallowed and the costs of this hearing be taxed in favor of the bankrupt and against the Bank of Nez Perce.

That the sale of the homestead be not confirmed:

That the accounting of the trustee be allowed in the sum of \$349.95.

That the bankrupt pay to the Trustee within 30 days from the date of the filing of this order the sum of all allowed claims in the sum of \$258.50; the sum of the expenses of the administration of the estate by the trustee as aforesaid in the sum of \$349.95; the sum of \$5.83 Commissions of Referee and filing fee on 13 claims and the sum of \$17.28 Commissions of Trustee making a total of \$631.56 and the bankrupt is hereby empowered and authorized to execute and deliver a mortgage on said homestead for the purpose of securing said sum if necessary.

That if for any reason the bankrupt fail or refuse to pay said sum to the trustee that the trustee sell said homestead to the highest bidder according to law and make return of said sale to the Court and upon confirmation thereof pay to the bankrupt and his wife the sum of \$5,000.00 and deposit the balance in the Ilo State Bank subject to the further orders of the court.

That if the bankrupt pay said sum of \$631.56 to the Trustee that the Trustee report the same to the Referee and deposit the same in the Ilo State Bank subject to the order of distribution of the same which order the Referee will make when such report is made.

Witness my hand at Ilo this 12th day of April, 1914.

G. ORR McMINIMY,
Referee in Bankruptcy.

Trans. pp. 19 to 35, inclusive.

When bankrupt first made his schedules, he talked with Mr. McDonald, his attorney, about scheduling a set-off against bank's judgment, and the attorney advised him that that was an after consideration and could be done later. Trans. p. 65 and 66.

At the trial, the Referee permitted amendment of schedules. Trans. p. 59.

Not later than the second day after bankrupt returned from penitentiary, he went to the bank at Nez Perce and had a conversation with Mr. Dowd, the cashier. Trans. p. 59.

"The conversation was in Mr. Dowd's office in the Bank of Nez Perce and I asked him what his idea was for protesting against my pardon and he said it was the advice of his attorney. He thought he would make the old woman "dig up." He knew it wasn't right, but that was the advice of his attorney, Mr. O'Neil,

and I asked him what they had done with the property that he had written to me that they had attached and he said he didn't know where it was or anything about it, and I said to him, now Mr. Dowd you get in and be a man and I will show you that I am a man, and he said he could do nothing. Everything was left to his attorney." Trans. p. 59 and 60.

Here, on the very second day after arriving home from the penitentiary as a free man, the bankrupt demands of Mr. Dowd what they had done with the attached property and demanded an accounting but Mr. Dowd could do nothing because "everything was left to his attorney."

And, instead of treating justly with the bankrupt, the bank gets execution after execution and, finally thereby forces him into the Bankruptcy Court where it can get no execution with which to torment and harrass the bankrupt.

But, immediately, as found by Referee, however, the attorney for the bank directs the Trustee to seize the personal property of Mrs. Pendel. The persecution therefore took the form of directing the Trustee in tormenting the bankrupt's wife and forcing her to defend her own personal property.

On the 21st of March, 1913, the Judge of the United States District Court wrote to the Trustee that he could not advise him, but suggested the propriety of the Pendels securing the services of some attorney to

arrange a plan to get the conclusion, it seems as we must infer, desired by the Pendels. Trans. p. 62.

This letter to the Trustee proves conclusively that the Pendels were making demands on the Trustee, which should be settled and determined.

In February, 1913, the bankrupt saw Mr. Collins—the president of the bank—and demanded an accounting for the attached property but Mr. Collins, like Mr. Dowd, could do nothing. Trans. p. 60 and 61.

And, on March 1st, 1913, Mr. O'Neil filed a petition for an order of sale of the homestead and secured from the Referee an ex-parte order of sale. And, at this very moment, the claim of the bank against the estate was not allowed.

In 1909, before bankruptcy proceedings, the bankrupt demanded of Mr. Dowd an accounting for the attached property. In February, 1913, before the bank procured the ex-parte order of sale, the bankrupt demanded of Mr. Collins—the bank's president—an accounting for the attached property.

Now, why did not the bank force action on the matter of the allowance of its claim? And why did the Referee not allow its claim as proved by it when it was filed, or presented to him?

Remembering that bankrupt was demanding an accounting for the attached property, and reading

the facts found by the Referee, the answer to the two foregoing questions is very easy. *The fact must be inferred that the bankrupt was objecting to the trustee and to the referee from the first and continuously against the allowance of the bank's claim without first making it account for the attached property.*

And the trustee did nothing except to get an ex-parte order for the sale of the homestead and to sell it and report its sale and ask confirmation.

On the absolute failure of the Trustee to defend his estate against the bank, the Referee permitted the bankrupt to make the defense, and, at his own expense, in June, July, August, he presented to the Referee his defense against the bank's claim and against the confirmation of the sale of his homestead.

The bankruptcy adjudication put the bankrupt under disability, except only, as hereinafter proven by citation of law, he had a right to report to Trustee objections to allowance of claims as provided by section 57, Bankrupt Act, 1898.

It must be assumed that the Referee would not permit bankrupt to defend the estate against the bank until it was very plain that the Trustee would not do so.

The bank and Trustee were under no disability and, at any time, after bank filed its claim either had

the absolute and unrestricted right to have a hearing before the Referee on the matter of the allowance of the claim. The bank can blame no one for the delay. It, itself, is to blame. It labored under no disability as did the bankrupt.

But the district court seemingly puts the whole blame for there not being a hearing sooner upon the bankrupt, and seems to think that, because bankrupt did not sooner get a hearing, he had never, at any previous time, made known an objection to the allowance of the bank's claim to either the Trustee or Referee; *and the District Court presents the idea of the bankrupt bringing his defense from concealment at too late an hour.*

The order of sale recites that notice was given and a meeting of creditors. Trans. p. 69. But this must refer to notice of petition for order of sale filed in 1910 by Trustee and upon which the proceedings in No. 1999 in this court was had, which petition was filed in 1910 and meeting of creditors had in 1910. Trans. p. 31. And therefore does not refer to any notice of the petition filed on the 1st day of March, 1913. Trans. p. 81-82, on which order of sale was based. Trans. p. 23.

However, the United States court held that notice of the petition filed on the 1st day of March, was not necessary.

But this view omits the consideration of the increase in the value of the homestead; omits the consideration of the question that the United States court did not in its order of May, 1912, fix any terms of sale but remanded the case to Referee to proceed according to law to sell the homestead in case \$4000.00 was not paid to Trustee within 30 days, and furthermore the order of the Honorable District Court of May, 1911, assumes that the bankrupt's estate owes the judgment of the Bank of Nez Perce, which is a very violent assumption in face of the facts found by the referee in the hearing on objections to allowance of that judgment as a claim against the estate and on objections to confirmation of sale, and on request to ascertain total liability of estate so that bankrupt could pay all in full. Trans. p. 19.

And furthermore at the time the exparte order was made or sale had the estate or homestead was worth from \$14,000 to \$15,000.00, when at time of order of May 20, 1911, the homestead was worth only \$9000.00. Here is an increase in value of \$6000.00; here is a changed condition.

And furthermore the order of sale was given and the order had at a time when the total liability of estate upon request of the bankrupt or of Mrs. Pendel

could be ascertained and fixed; for the time for filing claims had long before expired, and all the claims filed against the estate had not been allowed. Yet the Trustee pressed for sale of the homestead. Trans. p. 71. And did not defend the estate against the unjust claim of the Bank of Nez Perce. Trans. p. 31-31.

Mrs. Pendel has the right to object to allowance of the claim of Bank of Nez Perce, and nothing which the bankrupt or trustee could do could estop her. She had a right to object to the order of sale being made before allowance of claim of Bank of Nez Perce; she had a right to be heard as to terms of the order of sale. For she has a vested interest in the homestead.

The order of sale, however, was obtained upon the exparte petition though Referee wanted a notice and hearing. Trans. p. 31. And yet the Trustee has the impudence to insult the Referee in his petition for sale, Trans. pp. 11 and 12, by accusing Referee of holding off the sale so as to enable the bankrupt to get hay growing on the premises. This is done by this Trustee who in his report of sale attempts to reduce the bankrupts exemption just \$1571.90 by taking all sorts of expenses out of it. Trans. p. 80, 79, 78, 77. This is done by a trustee who tries to take from bank-

rupt's exemption the expenses of unlawfully seizing and keeping Mrs. Pendel's personal property, trans. p. 22-76 which he seized without any authority from the referee and under direction of Mr. O'Neil—the attorney for Bank of Nez Perce, trans. p. 22. Consequently, the proceedings of such a trustee should be very carefully and closely investigated. And it should be remembered, too, that the Trustee had failed to defend the estate against the claim of the Bank of Nez Perce, trans. p. 30-31—bottom and top, and had pressed for six months to get a sale of bankrupt's homestead, trans. p. 71.

The order of sale contains no terms other than that no bid less than \$5000.00 shall be considered by the Trustee. Trans p. 69-70. Probably, however, since the order does not specify terms of sale, the whole purchase price is ordered paid immediately to the Trustee.

The notice of sale fixes definite terms of sale, to-wit: Ten per cent of purchase price in cash at time of the sale; Ninety per cent of the purchase price at time of confirmation of sale. Trans. p. 83-84. Thus an indefinite credit is given on ninety per cent of the purchase price of the homestead. And no security required to insure the payment of the ninety per cent upon confirmation of the sale. But the District

Court says there is not necessarily conflict between order of sale and notice of sale. Trans. p. 46. And therefore dismisses the question.

The order of sale takes expenses out of the \$5000.00 exemption, trans. p. 70, and therefore invites a report of sale for confirmation which attempts to take an enormous amount out of the exemption. Trans. p. 75 to 81.

So the bankrupt just had to object to confirmation of sale as reported by Trustee, in order to protect his rights under the law.

The bankrupt, on behalf of the estate and on his own behalf, seeks a review of the question of law to determine whether the orders of the Referee should stand upon the merits, or be modified or reversed because of error of law, committed by him.

The total liability of the estate was fixed by Referee at the sum of \$631.56, and of this total liability, \$258.50 is for claims filed and allowed by the referee. The difference, therefore, between \$631.56 and \$258.50, which is \$373.06, is the total costs and expenses of administration fixed by the Referee.

The United States District Court, having reached the conclusion as matter of law, that the estate, as represented by the bankrupt, could not have relief on the merits, allowed the claim of the bank in the

total of \$3294.53, and adding this to the \$258.50, we have the total claim liability of the estate, as fixed by the United States District Court, in the sum \$3553.03. But the United States District Court affirmed the sale to Mr. Collins and extended the privilege to the bankrupt or his wife to pay to the Trustee within 35 days the sum of \$5500.00 with interest thereon at the rate of seven per cent from date of sale to Collins, making, practically, a total sum of \$6000.00.

This requirement to pay \$6000.00 to the Trustee is not justified since nothing appears showing any need for such an amount.

The questions to be reviewed are raised by the United States District Court decision and order on petitions to review the orders made by the Referee inasmuch as the Referee granted full relief and held with the estate, and ascertained the entire liability of the estate, allowed the estate's defenses on the merits, disallowed bank's claim, disaffirmed the sale and gave bankrupt 30 days within which to pay all liability of the estate. And these questions thus raised are presented in the assignment of error.

The total judgment of the Bank of Nez Perce including costs, and its date, are given by the United States District Court and the Referee as follows:

Date of Judgment Feb. 15th, 1909: Amount of judgment \$3635.16; amount of costs \$1747.12; total amount of judgment and costs \$5382.28. Trans. p. 36.

So it was unnecessary to have the claim of the Bank of Nez Perce certified so as to know the total judgment and costs. The United States Court gives the amount realized on the execution sale which is \$1956.25, and after application of this amount on the costs and judgment states the remainder which is \$3427.93 and orders the amount realized from the sale on order of the court, which is \$131.50, deducted from the remainder. Trans. p. 44. But United States District Court fails to order the \$57.00, realized from sale of five hogs, deducted.

Now, Referee finds the value of the property when attached to be \$6522.00 and that the total amount of this value which has been accounted for arises from the three sales—trans. p. 24—and adding the items at the amounts of \$2000.00 and \$57.00 and \$131.50, we have the sum as stated of \$2188.50, which deducted from the \$6522.00 leaves \$4333.50 unaccounted for by the bank. If the bank must apply this \$4333.50 on the balance of its judgment above stated as a payment or if the bank must account for it, the bank's judgment can not be allowed as a claim against bankrupt's estate.

ASSIGNMENT OF ERRORS.

The bankrupt assigns for himself and for his estate, that the District Court committed error in the following matter of law, to-wit:

First: Erred in each and every particular, severally and separately, stated in his petition for review by the United States Court of Appeals. See his petition for review. Trans. p. —————.

Second: Erred in holding that the bankrupt had committed such fraud on the Bankruptcy Court and the Bank of Nezperce in the matters referred to by the Honorable Judge of the District Court as to require the holding that the estate and the bankrupt could not have relief on the merits against the Bank of Nez Perce, and were thereby estopped to prove the facts upon which the relief on the merits depend.

Third: Erred in holding that all claims for wrongful attachment were merged in, or extinguished, by the judgment which the Bank of Nez Perce recovered in the state court against the bankrupt and his wife, erred in holding that such merger and extinguishment were effected by section 4185, Revised Codes of Idaho.

Fourth: Erred in holding that the rule established by the case of William vs. Friedman, 4 Idaho, 209, merged and extinguished all claims for wrongful at-

tachment in the judgment recovered by the bank in the state court.

Fifth: Erred in holding that the sales on process of the attached property, including the execution sale on the 6th of April, 1909, were valid and legal.

Sixth: Erred in holding that section 4055, Revised Codes of Idaho, relieved the bank of all liability to the estate on the merits, on the ground that all action for relief on the part of the bank against the sheriff and his bondsmen was barred by section 4055, *supra*.

Seventh: Erred in holding that the bank was released from all liability to the estate on the merits, on the ground that an action by the Trustee, commenced at the time the referee heard evidence on the objections to the allowance of the judgment against the estate as a claim to be paid in due course of administration, was barred by section 4054, Revised Codes of Idaho.

Eighth: Erred in holding that the matters found by the Referee were not set-offs in favor of the estate within section 68 of the Bankruptcy Act of 1898, and therefore cannot be used to set-off against the judgment of the bank.

Ninth: Erred in holding in effect that the estate and the bankrupt could not have it decreed upon the

facts that the judgment was paid and satisfied to the extent of the value of the property taken on attachment and execution, which payment, of course would be of date of April 6, 1909, the date of the execution sale.

Tenth: Erred in holding that the estate and the bankrupt were guilty of such lashes that they could not have the relief sought on the merits.

Eleventh: Erred in allowing the judgment of the bank in any amount as a claim against the estate.

Twelfth: Erred in allowing the judgment as a claim against the estate in the amount for which it was filed, less \$131.50.

Thirteenth: Erred in not disallowing the judgment against the estate as a claim to be paid in due course of administration; erred in reversing the order of the Referee disallowing the claim of the bank against the estate.

Fourteenth: Erred in affirming the sale of the homestead to Mr. Collins—the purchaser.

Fifteenth: Erred in fixing \$5500.00 and interest thereon at the rate of seven per cent as the amount which the bankrupt or his wife might pay to the Trustee within 35 days and thereby redeem the homestead from bankruptcy administration; the amount to be paid in is large and not needed for payment in

full of all liability of the estate; erred in not giving a greater period than 35 days for redemption of homestead from bankruptcy administration.

Sixteenth: Erred in not fixing the amount of costs and expenses of administration, so that the bankrupt or his wife might pay them in full; erred in leaving the costs and expenses of administration open to future litigation and the expense of future litigation.

Seventeenth: Erred in holding that the bankrupt had no right to defend his estate and himself against the allowance of the bank, and had no right to any credit or payment on the judgment except only \$131.50 in addition to amount gotten on the execution sale on the 6th of April, 1909.

Eighteenth: Erred in holding that because of the rules of law adopted by the Honorable District Judge the bankrupt had no right to defend himself and his estate, and show that neither he nor his estate owed, or owes, the bank one cent.

The foregoing errors must be taken as error committed against the estate, against the bankrupt and against the bankrupt's wife, and considered as errors assigned by the bankrupt for the benefit of himself, his estate and the benefit also of his wife. He has a right to thus assign errors because, in so far as concerns the controversy over the allowance of the bank's

claim against the estate, he represents the estate as well as himself; he represents the estate, simply because, by permission of the Referee, he makes the defense which the Trustee should make and he is making that defense for the Trustee as well as for himself.

Each error assigned will not be considered separately, or severally, for the reason that each error is so related to every other error which is assigned that an argument on them, considered collectively, will be clearer and much more desirable, and far the best and most convincing presentation of the errors assigned. So we argue all of them and claim relief because of each error assigned.

JURISDICTION OF THE COURT.

The Honorable United States Court of Appeals has decided that all questions of law as to a creditor's claim can be decided on review under subdivision b of section 24 though there can be an appeal taken from the allowance or disallowance of the claim under either sections of the Bankruptcy Act, and that an appeal will be considered as an application for revision under section 24 b. *supra*.

In re Williams Estate, 140 Fed. 710, (C. C. A. 9th Circuit).

In this connection, it must be noted that the disallowance of the claim of the bank by the Referee was made upon a record mixed with other matters from which no appeal lies at all under the Bankruptcy Act, and the allowance of the claim by the District Court was also mixed with other matters which can not be appealed from. That part of the review which relates to the claim of the bank is exclusively upon matters of law, and no question of fact to be reviewed, at all. The Honorable District Judge found no facts contrary to the facts found by the Referee. And it is exclusively a question of law as follows: *Can relief be given to the estate and the bankrupt upon the merits, and upon the facts found by the Referee, in so far as concerns the allowance or disallowance of the bank's claim?*

All the other questions, raised by the bankrupt's petition for review, can, under the Bankruptcy Act, be presented in no other way, and not by appeal.

IDAHO STATUTE.

The Idaho statutes involved on this review are as follows:

Sec. 4050. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

Sec. 4055. Within two years: An action against a sheriff, coroner, or constable, upon the liability incurred by the doing of an act in his official capacity, and in virtue of his office, including non-payment of money collected upon execution.

Section 4054. Within three years: An action for trespass upon real property. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.

Section 4070. If a person entitled to bring an action, other than for the recovery of real property, be, at the time the cause of action accrued, imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life; The time of such disability is not a part of the time limited for the commencement of the action.

Section 4185. If the defendant omits to set up a counter claim in the cases mentioned in the first subdivision of the last section, neither he nor his assignee can afterward maintain an action against the plaintiff therefor.

The section, referred to in section 4185, is section 4184, which is as follows: The counter claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between

whom a several judgment might be had in the action, and arising out of one of the following causes of action :

1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action ;

2. In an action arising upon contract ; any other cause of action also arising upon contract and existing at the commencement of the action.

The section referred to in section 4184, is section 4183, which is as follows. The answer of the defendant shall contain :

1. A general or specific denial of the material allegations of the complaint controverted by the defendant ;

2. A statement of any new matter constituting a defense or counted claim. If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information or belief of defendant. If the defendant has no information or belief upon the subject to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on the ground. If the complaint be not veri-

fied a general denial is sufficient, but only puts in issue the material allegations of the complaint.

The Idaho statute which is construed in the case of *Willman vs. Friedman*, 4 Idaho, 209, and referred to by the District Court on page 40 of the transcript, is as follows, and is section 4188 of the Codes of Idaho: "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, *or affecting the property to which the action relates*, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint.

Section 2047. Notwithstanding the election and qualification of a new sheriff, the former sheriff must return all process and orders before and after judgment, which he has fully executed, and must complete the execution of all final process which he has begun to execute previous to the expiration of his term of office.

COMMENT ON THE STATUTES.

Willman vs. Friedman, supra, says nothing about section 4185, supra, and does not pretend to construe it. The claim for damages on account of a wrongful attachment was presented in the Willman case by cross complaint and not by answer under sections 4184 and 4183, supra. The damages arose out of the action which affected the property which was attached and did not arise out of the cause of action contained in the complaint, or the transaction set forth in the complaint, which was simply the note transaction, and nothing more, and therefore these damages for wrongful attachment could not be claimed under sections 4183 and 4184, supra, but must be claimed exclusively under section 4188 under that provision which authorizes the filing of a cross complaint because the action affected the property attached and not because the damages arose out of the note transaction, or cause of action set forth in the complaint. *The difference is marked and distinct.*

If section 4055, supra, bars a cause of action against the attaching plaintiff, then the attachment defendant has not three years under section 4054, supra, within which to commence an action against the attaching plaintiff, but must commence such action within two years under section 4055. This

observation reveals the false reasoning of the learned District Judge in his discussion of section 4055, supra, and shows that section 4055 has nothing to do with the question before the court.

The objections to the allowance of a claim which objections are authorized by the Bankrupt Act is not the commencement of an action under section 4054, supra, or section 4055, supra. *Each claim against the bankrupt's estate at the time of the bankruptcy adjudication is burdened with all set-offs or objections to its allowance, and the fact that the trial on the allowance of the claim was delayed can not release such claim from the burdens on it at the time of the adjudication of bankruptcy; consequently, a state statute of limitation cannot run against the estate's objections or set-offs after adjudication of bankruptcy. If such statutes did, the result would be a preference of a creditor of the estate.*

When a sheriff has destroyed property of a defendant debtor while holding it under attachment and execution, the payment to the extent of the value of the property injured or destroyed, or the cause of action against the judgment plaintiff does not accrue until the execution sale as will be hereinafter demonstrated.

Section 2047, *supra*, will also be hereinafter presented to the court on the question of the right of an ex-sheriff to sell at execution sale attached property on an execution issued after he ceased to be a sheriff.

POINTS

Point 1. The bankrupt had a right to object to allowance of bank's claim. He was under disability after bankruptcy adjudication. He could not estop his estate. He could only defend his estate by permission of bankruptcy court. Claims when filed are burdened with all of estate's defenses. Statutes of limitation do not run against defenses of estate to allowance of claims after bankruptcy adjudication. The Bankruptcy Act requires no formal written objections to allowance of claims. The estate had a right to all its defenses against the allowance of bank's claim at the time of the trial in 1913. And state statutes of limitation did not run against estate's defenses.

AUTHORITY UNDER POINT 1.

"The better rule seems to be that where defendant's claim in set-off was an existing debt not barred by the statute of limitations at the time plaintiff's

action was begun, it will be a valid set-off, although the statutory period may have elapsed before filing of the answer setting it up."

25 Cyc. 1312;

McDougal vs. Hulet, 132 Cal. 154;

Perkins vs. West Coast Lumber Co., 120 Cal. 27;

Camp vs. Gullett, 7 Ark. 524;

Eva vs. Louis, 91 Ind. 457;

Parker vs. Sanborn, 7 Gray, 191;

Hobert vs. Day, 33 Hun. 461;

Brumble vs. Brown, 71 N. C., 513;

McEwing vs. James, 36 Ohio St., 152;

Paduch, Etc. R. Co. vs. Parks, 86 Tenn. 554;

Williams vs. Lenon, 8 Baxt. 395;

Crook vs. McGreal, 3 Tex. 487;

Walker vs. Fearhake, 22 Tex. Civ. App. 61,

Walker vs. Clements, 15 Q. B. 1046.

The principle above stated as to set-offs not becoming barred after commencement of an action applies to damages for a tort or negligence.

Perkins vs. West Coast Lumber Co., *supra*.

The filing of the claim against the estate, certainly, is equivalent to the commencement of an action in a state court.

Again, all causes of action against the bankrupt which were not barred by a state statute at the date

of the bankruptcy adjudication cannot subsequently bar such causes of action against the estate if the claims and proof therefor have been filed in time, and if claims and proof are not filed in time only the Bankruptcy Act forbids their allowance against estate.

In re Wright, 6 Bliss. (U. S.) 30 Fed. Cas. No. 18,068;

In re Eldridge, 2 Hughes (U. S.) 256, 8 Fed. Cas. No. 4331;

Wolferd vs. Unger, 53 Tex. 634.

If the state statutes will not run against the causes of action of the creditors as claims against the estate subsequent to bankruptcy adjudication, it seems unreasonable to hold that the state statutes run against causes of action in favor of the estate so as to bar them as set offs against claims filed against the estate.

Statutes of limitation never run against pure defenses to a cause of action.

25 Cyc. 1063, O.

The statutes of Limitation never apply to plea in bar alleging payment.

25 Cyc. 1063, O.;

Blackshear vs. Dekle, 120 Ga. 766;

Grover vs. Tingle, 21 Ky. L. Rep. 885;

King vs. King, 9 N. J. Eq. 44;

Compty vs. Aiken, 2 Bay, 481, (S. Car.) ;

Tinkham vs. Smith, 56 Vt. 187.

“The defense of reduction or recoupment which arises out of the same transaction as the claim survives as long as the cause of action upon the claim exists, although an affirmative action upon the subject of it may be barred by the statute of limitation.”

25 Cyc. 1063 ;

Grant vs. Burr, 54 Cal. 298 ;

Conner vs. Smith, 88 Ala. 300 ;

Becker vs. Baldwin, 55 Conn. 419 ;

Brown vs. Miller, 38 Ill., App. 262 ;

Sherman vs. Sherman, 36 Ill. App. 482 ;

Morris vs. Hulme, 71 Kans. 628 ;

Lastrapes vs. Rocquet, 23 La Ann. 68 ;

Nicholas vs. Hause, 2 La. 382 ;

Bushnell vs. Brown (La.), 4 Mart. N. S.,
499 ;

Davenport vs. Fortier (La.), 3 Mart. N. S.
695 ;

Thompson vs. Milburn (La.), 1 Mart. N.
S. 468 ;

Aultman vs. Toney, 55 Minn. 492 ;

Feld vs. Coleman, 72 Miss. 545 ;

Welch vs. Usher, Riley, Eq. 121 ;

Rosborough vs. Picton, 12 Tex. Civ. App.
113 ;

Williams vs. Neely, 134 Fed. 1, 67 C. C. A. 171;

Ord vs. Ruspine, 2 Esp. 569.

The payment, or set-off, claimed by the bankrupt's estate accrued on the 6th of April, 1909. The defense grew out of the proceedings in the state court which culminated in a judgment on the 15th of February, 1909, and in an execution sale on the 6th of April, 1909. Therefore, so long as the right exists to sue on the judgment, the right to defend against the judgment for damages which grew out of the wrongful attachment, out of the waste and destruction of the property and the execution sale, must also exist and cannot be barred by a statute of limitation. This right which grew out of the wrongful attachment, out of the waste and destruction of the property and out of the execution is a cross-demand against the bank, accruing on the 6th of April, 1909, for \$4333.50.

"When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counter claim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other."

Section 4186, Revised Codes of Idaho.

So, if the bank had commenced an action on its judgment for balance after applying \$2188.50 there-

on, the bankrupt could have set up his cross-demand in the sum of \$4333.50, and the bank could get no new judgment against him in the state courts.

If he could do this in the state courts, it would seem, indeed, that the bank can not relieve its judgment of the estate's cross-demand for \$4333.50.

The judgment when filed against the estate was burdened with this cross-demand whether it be considered as a payment or simply as a set-off within the meaning of subdivision A of section 68, Bankruptcy Act, 1898.

By scheduling the judgment as unpaid and by failing, at first, to schedule the cross-demand can not take the judgment from under the burden of *the cross-demand in favor of the estate.*

To hold that the judgment can be thus released from the burden of the cross-demand in favor of the estate is to hold that a bankrupt can prefer a creditor by failing to schedule at first the cross-demands against the judgment scheduled as unpaid, and thereby give the right to such judgment debtor to collect the judgment the second time from the property of the bankrupt.

To hold that sections 4055 and 4054, Revised Codes of Idaho, release the judgment from the burden of the estate's cross-demand is to permit those sections

to give a preference to the bank and to give the bank the right to collect its judgment the second time from the property of the bankrupt.

The next thing to be done in tracing the authority is to understand the filing and proving a claim against the estate of a bankrupt and the manner of its allowance or disallowance.

The proof of claims against a bankrupt's estate must be a written statement under oath setting forth the claim, its consideration, payments made on it and "that the sum claimed is justly owing from the bankrupt to the creditor."

Sub-division A section 57, Bankrupt Act.

To ascertain whether the claim was "justly owing from the bankrupt to the creditor," *at the time proof of claim was filed, it there is* an objection on account of a set-off in favor of the estate, the Referee must ascertain the "mutual debts or mutual credits" existing between the claimant and the estate at the time proof of claim was filed or at time of the adjudication of bankruptcy.

Section 68, subdivision A, Bankrupt Act.

If no objection is made to, or no cause exists against the allowance of the claim as filed, the court must allow it when received or presented, but if

there is objection or cause, the Court can continue the matter of the allowance of the claim.

Subdivision d, section 57, Bankruptcy Act.

The objections shall be heard as soon as the "best interests of the estates and claimants will permit."

Subdivision f, section 57, Bankruptcy Act.

And claims which have been allowed "may be reconsidered for cause and reallocated or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed."

Subdivision k, section 57, Bankruptcy Act.

Thus, therefore, it is seen that the time for making objection to a claim as proved by claimant extends from the day of filing the claim to the time when the estate is closed. And there is nothing in the Bankruptcy Act which requires the objection to be in writing or under oath, or even filed with the Referee or Court. So it may be orally made. *And, since the Referee did not allow the claim of the Bank of Nez Perce when the proof and it were received by, or presented to him, it must be conclusively presumed, when there is no evidence or fact to the contrary, that there was immediate objection to, or cause against its allowance under the proof filed.*

It is the duty of the bankrupt to examine "the correctness of all proofs of claims filed against his

estate,” and, if to his knowledge any person has “proved a false claim against his estate, disclose that fact immediately to his trustee.”

Subdivisions (3) and (7), Sec. 7, Bankrupt Act.

But he shall not be required to examine proofs of claims at a place more than one hundred miles from his home unless ordered to do so by the court.

Subdivision (9), Sec. 7, Bankrupt Act.

Thus it clearly appears that the trial under section 68, Bankrupt Act, relates exclusively to the time when claimant filed his proof of claim or to the time of bankruptcy adjudication, for sole purpose of ascertaining the “mutual debts or mutual credits” as of that date and not as of date of trial or some other date.

The claim of the Bank of Nez Perce as filed and when filed was *burdened with all objections to its allowance which then existed and any interested party had a right at any time before the estate was closed to insist upon these objections.*

The learned United States Court overlooked the truth last above stated and all the foregoing truths, and apparently assumed that *no real objections existed at the time bank filed its proof of claim* and that there was no real objections until the date of the trial before the Referee and that the claim of the

bank was not burdened, at the time it was filed, with these objections against its allowance as filed which were proven in June, July, and August, 1913.

The very fact that the Bank of Nez Perce did not force action of the court on the allowance of its claim proves conclusively that its claim, at all times from the day it was filed, was burdened with the defenses proven in 1913.

The "mutual credits" of section 68, Bankrupt Act, *are cross-demands*, existing, at time the bank filed its claim or at time of bankruptcy adjudication, between the bank and the bankrupt.

Of course, the defense of payment of judgment is also a defense which existed at the time the bank filed the proof of its claim; consequently, it, at once, must be noted that the state statutes cannot run against the defenses of the estate to the allowance of a claim as proved—that is cannot run after adjudication of bankruptcy—and can only run against the estate's right to bring actions in the state courts on causes of action which passed to the trustee upon bankruptcy adjudication. *The distinction is a very marked difference*, and shows how great an error the United States District Court made in not enforcing the distinction in the proceedings at bar.

When all the law cited under point 1 is applied to

the facts found by the Referee, it will be seen that the United States District Court erred in regard to laches fraud, estoppel and the statutes of limitation.

POINT A.

The Bankruptcy Court has power to liquidate damages, and to set them off against demands on contract. Subdivision b of section 68 Bankruptcy Act does not refer to set-offs in favor of the estate.

AUTHORITY UNDER POINT A.

The Referee under section 68 of the Bankruptcy Act of 1898 had the power and jurisdiction to liquidate unliquidated damages and to set-off enough of the amount against the judgment of the Bank of Nez Perce to satisfy it, and thereupon to disallow it.

In re Harper, 175, Fed. 412.

Subdivision b of section 68, *supra*, does not refer or apply to set-off in favor of the estate and against the estate's creditor.

In re Harper, *supra*.

Consequently, the set-off in favor of the estate does not have to be provable against the estate under section 63, Bankruptcy Act, 1898.

In re Harper, *supra*.

POINT II.

The judgment of the bank was paid in full on the 6th of April, 1909.

AUTHORITY UNDER POINT II.

Since the Bank of Nez Perce seized on writ of attachment on or about the 28th of June, 1908, and subsequently sold it either on order of sale or on execution as it claimed, personal property of the bankrupt of the value of \$6522.00, the burden of proof was on the bank to prove that its judgment against the bankrupt for less than \$6522.00 was not paid and satisfied in full, though not satisfied of record.

23 Cyc. 1488, F.

Where the sheriff on writ of attachment has seized property of the judgment debtor of the value of \$6522.00 and claims to have sold it on order of sale and execution—except five of the attached hogs, which were sold by the parties for about \$57.00—and only got for a part of the attached property, sold on order of court, the sum of \$131.50, and for a part of the attached property, sold on execution, about \$2000.00, making a total of \$2188.50, leaving the sum of \$4333.50 of the value unaccounted for, and the evidence shows that the sheriff and his keepers negligently wasted, destroyed and injured the prop-

erty, the presumption of law that a judgement against the owner of the attached property for less than \$6522.00 and for more than \$2188.50 is satisfied and paid becomes conclusive.

Freeman on Judgements, 2 Vol. 4th Ed. Section 475, pp. 819, 820, 817;

Campbell vs. Spence 4 Ala. 543; 39 Am. Dec. 301;

Harris vs. Evans, 81 Illinois, 419;

Hershaw vs. Merchant's Bank, (Miss.), 7 How. 386; 40 Am. Dec. 70;

People vs. Hopson, (N. Y.), 1 Den. 574;

Sewell vs. Morgan, (Tenn.), 2 Heisk. 672;

Harmon vs. State, 82 Ind. 197;

Peek vs. Tiffany, 2 N. Y. 451;

Pickens vs. Marlow, 2 Smedes & M. 428;

Ladd vs. Blunt, 4 Mass. 402;

Trenary vs. Cheever, 48 Illinois, 28.

Hoard vs. Wilcox, 47 Pa. St. 51;

Yourt vs. Hopkins, 24 Illinois 326;

Kendrick vs. Hull, 71 Mo. 570.

POINT III.

The estate on the 9th of February, 1911, when the bank filed and proved its claim, and on February 14, 1910, had a set-off of \$4,333. 50, which set-off accrued

in favor of bankrupt on the 6th of April, 1909, and not before.

AUTHORITY UNDER POINT III.

Where a judgment creditor wrongfully attaches personal property of the judgment debtor of the value of \$6522.00, though there is no waste or destruction by the sheriff and he afterward sells a small part of the attached property on order of court for \$131.50, and on the 6th of April, 1909, sells another part on execution for about \$2000.00—the parties having previously sold five of the attached hogs at private sale for about \$57.00—making in all the total sum of \$2188.50 gotten for the attached property, leaving the sum of \$4333.50 of the value unaccounted for to the judgment debtor, a cause of action accrues on the 6th of April, 1909, in favor of the judgment debtor against the judgment creditor for the sum of \$4333.50, and jointly against the judgment creditor, the sheriff and his bondsmen.

Files vs. Davis, 119 Fed. 1002;

Ruthven vs. Beckwith, (Iowa), 45 N. W. 1073;

Empire Mill Co. vs. Lovell, (Iowa), 41 N. W. 583;

Mayer vs. Duke, (Tex.), 10 S. W. 565;

Blass vs. Lee, 55 Ark. 329; 18 S. W. 186;

Hundley vs. Chadwick, 109 Ala. 517; 19 So. 845;

Probable cause for suing out the attachment can not be shown in mitigation of actual damages.

Schofield vs. Territory, 9 N. M. 526, 56 Pac. 306.

The levy of execution immediately after dissolution of attachment is not matter in mitigation of damages caused by the wrongful attachment.

Miller vs. Baker, 79 S. W. 187.

The seizure of property which has been wrongfully attached subsequently on another writ of attachment or on writ of execution, and the application of the property so subsequently seized without the owner's consent, cannot be shown either in defense or in mitigation of damages for the wrongful attachment.

Tiffany vs. Lord, 65 N. Y. 310;

Wehle vs. Butler, 61 N. Y. 245;

Lyon vs. Yates, 52, Barb. (N. Y.), 237;

Otis vs. Jones, 21 Wend. (N. Y.), 394;

Hanmer vs. Wilsey, 17 Wend. (N. Y.) 91;

Geller vs. Rosenfeld, 139 App. Div. 289, 123 N. Y., Supp. 628;

Churchill vs. Abraham, 22 Illinois 456;
4 Cyc. 860, Notes 14 and 23.

In the case at bar, considering the fact of destruction, and waste of the property and injury to it, by

and through the negligence of the sheriff and his keepers, and that the attached property had a value of \$6522.00 at the time it was attached, it is justice and equity to hold that the measure of damages is the difference between \$6522.00 and the \$2188.50, which is, as above stated, exactly \$4333.50, and, if the judgment is to draw interest from the 6th of April, 1909, the \$4333.50 should also draw interest from April 6th, 1909.

Excluding these damages in the sum of \$4333.50, and not requiring the bank to credit the \$57.00 on its judgment, which it secured from the private sale of the five hogs, the District Court orders the bank's judgment to be allowed against the estate in the sum of \$3294.53, having ordered only a credit of \$131.50 for the amount gotten on the attachment sale, and which the bank had not credited on the judgment. There is no reason for the United States District Court nor ordering the sum of \$57.00 credited on the judgment, since the bank had never given credit therefor when it filed proof of its claim.

If the estate is given credit for the \$4333.50 in adjusting the account under section 68, Bankrupt Act, 1898, then, of course, the bank's claim is wiped out and should not be allowed. There will yet be a balance due the estate.

POINT IV.

The reasons given by the United States District Court why the estate cannot have defense of payment and set-off are extremely technical. The estate has a right to have benefit of all defenses to allowance of claims so long as estate remains unclosed. No bankrupt by any act of his can deprive his estate of these defenses. Sections 4055 and 4054, Revised Codes of Idaho can not deprive estate of its defenses against allowance of claims. The omission of defenses of estate from schedules of bankrupt can not deprive estate of its defenses to allowance of claims nor can the scheduling of a judgment by bankrupt deprive estate of its defenses. Bankruptcy adjudication suspends all state statutes in so far as concerns allowance of claims.

AUTHORITY UNDER POINT IV.

If the bank had done its duty, or if it had been diligent in the matter of having its claims allowed or disallowed, it could have had the matter heard long before its right of action, if it has any on account of it being blameless, which fact is not supported by anything, against the sheriff and his bondsmen was barred by section 4055, Revised Codes of Idaho, relied upon by the United States Court to free the bank from all liability to the bankrupt's estate.

And at any time Frank M. Pindel, after the cause of action accrued, could have sued either the bank alone, or the sheriff alone, or the sheriff and his bondsmen alone, or the bank and the sheriff jointly, and had he sued the sheriff and the bank as joint-tort-feasors, and had enforced the judgment exclusively against the bank, and made it pay all of it, the bank could not have had contribution from sheriff.

Forsythe vs. Los Angeles Ry. Co. (Cal.) 87 Pac. 24;

Fakes vs. Price, (Okla.) 89 Pac. 1123;

38 Cyc. 493 (1) ;

38 Cyc. 490, i, and notes 25 and 26;

38 Cyc. 2055, b, 2057, e;

4 Cyc. 831;

38 Cyc. 2041, e.

So it is seen that the bankrupt could have elected to sue the bank alone; if the bankrupt had this right, the right passed to the estate and, as a set-off, no statute of limitation run against it, and certainly not sections 4055 and 4054, of Revised Codes of Idaho.

And his right to sue the bank did not depend upon the right of the bank to sue, and recover from, the sheriff and his bondsmen; yet, the United States Court, by his idea as to section 4055, Revised Codes of Idaho, holds that the estate can not have credit

under section 68, Bankrupt Act, 1898, for \$4333.50 damages against the judgment of the bank, filed as a claim against the estate, simply because all right of action of the bank against the sheriff and his bondsmen, is barred by section 4055, *supra*.

This is a new and strange proposition with no authority to support it.

Now, we come to the proposition that the estate cannot have credit for the \$4333.50 under section 68, Bankrupt Act, simply because a plenary action commenced by the Trustee at the time of the trial before the Referee was barred by section 4054, Revised Codes of Idaho. *See authority under point 1.*

A bankrupt, or any creditor, as before stated, has a right to object to the allowance of a claim so long as the estate is unclosed.

Sec. 7, BaBnkruptcy Act, sub-divisions (3), (6), (7) and (9);

Sec. 57 Bankruptcy Act, sub-divisions, d and k;

Atkins vs. Wilcox, 105 Fed. 595; 44 C. C. A., 625; 53, L. R. A., 118;

In re Summer, 101 Fed. 224;
4 Cyc. 333, F.

The adjudication of bankruptcy suspends all state statutes of limitation in so far as concerns the allowance of claims under section 68, Bankrupt Act, 1898. And any claim against the estate which was not

barred at the time of the adjudication of bankruptcy will never be barred as a claim against the estate by any statute or United States statute, since such statutes do not run against it as a claim against the estate.

In re Wright, 6 Bliss. (U. S.) 30 Fed. Cas. No. 18068;

In re Eldridge, 2 Hughes (U. S.) 256, 8 Fed. Cas. No. 4331;

Wolford vs. Unger, 53 Tex. 634.

Where a bankrupt has scheduled barred debts, this act does not revive them and make them payable against the estate.

In re Lipman, 94 Fed. 353, 2 Am. Bankr. Rep. 46;

In re Rester, 2 Am. Bankr, Rep. 166, 95 Fed. 804;

It certainly must be true that if the bankrupt schedules a judgment which has been paid as an unpaid debt he cannot thereby make it an unpaid debt.

To get the benefit of unliquidated damages for tort of a creditor of the estate as a set-off under section 68, Bankrupt Act, the estate does not have to commence an action in the state or United States Courts, but the Referee under section 68, *supra*, can liquidate such claim of the estate for the purpose of setting it off against the estate's creditor's claim.

In re Harper, *supra*.

Consequently, as a claim against the estate, the judgment of the bank on adjudication of bankruptcy was burdened by section 68, Bankrupt Act, then and there, with the claim of the estate against the bank, and that burden became inseparable from the claim of the bank, and the claim of the bank, when filed as a claim against the estate, was, then and there, burdened with the claim of the estate against the bank, and that burden remained on the claim continuously so far as concerns its allowance by the Referee and the Bankruptcy Courts, and it could not be allowed with that burden on it.

In re Gerson, 105 Fed. 893, 5 Am. Bankr. Rep. 850.

This thought shows that no objection, formally made, was required to be made by any one prior to the expiration of the period within which the Trustee had a right to sue the bank in the state courts to keep the state statute from barring the claim of the estate as a set-off under section 68, Bankruptcy Act. *This reasoning is true, and cannot be refuted.* For the filing of the judgment against the estate as a claim to be allowed commenced the proceedings for its allowance under section 68, Bankrupt Act, and the bankrupt was not required to file written objections in any certain time thereafter to its allowance.

It, as already stated, was merely his duty to inform

the trustee of objections to the allowance of the claim, and to examine the correctness of "all proofs of claims filed against his estate" and when any person filed a false claim against his estate to "disclose that fact immediately to his trustee."

Sec. 7 Bankruptcy Act, subdivisions, (3), (7), (9).

Now, as already stated, the claimant must prepare and file certain proofs; he must give credit for all payments which have been made on the claim, stating the payments and he must show that the claim is justly owing by the bankrupt to him.

Section 57, Bankrupt Act.

The claim of the bank is false, if the facts are given force and effect which were proved before the Referee and found by him, and it should never have been allowed by him. The claims filed, as already stated, shall be allowed upon receipt by or upon presentation to the court" unless objection to their allowance shall be made by the parties in interest, or their consideration be continued for cause by the court upon its own motion."

Section 57, *supra*, sub-division d, thereof.

Now, there is a presumption that courts do their duty; consequently, if nothing appears to the contrary, it must be presumed that the referee did not allow the claim when he received it, or when it was

presented to him by the bank simply because objections had been made to its allowance, or for "cause" he continued its consideration. No one can read the facts he found upon the hearing in June, July and August, 1913, and conclude that he did not have "cause" for not allowing the claim when it was filed or that there had been no objections made to the allowance of the claim.

The bank, as already stated, had a right to force a hearing on the allowance of its claim at any time.

Section 57, *supra*, subdivision f thereof.

Even, as hereinbefore stated, after the claim has been allowed it may, at any time, before the estate is closed, be "reconsidered" and "realloved or rejected in whole or in part, according to the equities of the case."

Section 57, sub-division k thereof.

Here, we have the proposition of doing equity in the matter of the allowance of claims against the estate. It certainly is not equity to make the estate pay the claim of the bank when the estate has a claim of \$4333.50 against the bank, which under authority already cited may be considered as a payment on the judgment of the bank.

An examination of the whole Bankruptcy Act, we confidently believe, will not disclose a limitation on

the right of any interested party to make objections to allowance of claims after they are filed, or that they must make such objections within any certain time prior to the closing of the estate, or that the objections shall be filed in writing with the Referee. Certainly section 57, *supra*, of the Bankruptcy Act, does not require the bankrupt to file written objections with the Referee, nor does that section put upon him the burden of bringing the issues on the allowance of claims to a trial; *that section, however, puts upon him the duty of seeing that no false claims are allowed against his estate.*

He has been compelled in the proceedings at bar by the inaction of the Trustee and the activity of the Trustee to get his homestead sold and the sale confirmed without having the issues as to the claim of the bank settled to appear and get permission of the Referee to defend his estate; and he has been expending his own money in this defense.

For doing this, the learned District Court has criticised him very severely, indeed.

We are persuaded to believe that the attorney, who prepared his schedules for him, considered that he had a right under section 57, Bankruptcy Act, to state his objections to the allowance of the claim of the Bank of Nez Perce to the Trustee or to the Ref-

eree, and, therefore, that may be the way it was thought the matter should be handled.

Indeed, in view of the facts found by the Referee and in view of the law cited herein, it was a very great difficulty to determine whether the defense to the allowance of the claim was payment or set off. The attorney could not have the bankrupt schedule the judgment as a paid judgment, and expect notice to be sent to the bank under the Bankruptcy law; therefore, he certainly considered that he should have the bankrupt schedule it as a debt of the estate, since it was unsatisfied of record, and therefore necessary to treat it as an unsatisfied judgment to force the bank to file it against the estate and thereby present the controversy for settlement by the Bankruptcy Court.

We believe confidently that, under the authority, the real question presented to the court, upon the facts, is the question of payment of the judgment, rather than the question of set-off.

Yet, we have not felt it safe to present the case entirely upon that theory, since the defense of payment and set-off are, not inconsistent and both depend upon facts which do not exclude the other as a defense. *See authority under point 1 as to statute of limitations.*

POINT V.

The taking of the property by the bank for the purpose of applying it on the debt owed by the bankrupt may be treated as a tort, but since there was a wrongful taking followed by waste and destruction and an execution sale, the tort can be waived and the recovery had as upon an implied promise to pay the reasonable value of the property—there being a payment on the reasonable value of \$2188.50.

AUTHORITY UNDER POINT V.

It sometimes happens that a tort can be waived and the recovery had for the reasonable value of the property as upon an implied contract to pay the reasonable value.

Cushman vs. Jewell, 7 Hun. (N. Y.), 525;

Tyson vs. Baker, 7 Lans. 511;

Lythgoe vs. Vernon, 7 H. and N. 180;

Brown vs. Sparrow, 7 B. and C. 310;

Hawk vs. Thorn, 54 Barb. 164;

Cooper vs. Shepherd, 3 C. B. 266;

Foreman vs. Nielson, 2 Rich. Eq. (S. C.)
287;

Goss vs. Mather, 2 Lans. (N. Y.), 283;

Willington vs. Drew, 16 Me. 51;

Gilman vs. Ware, 19 Ala. 252;

Firemen's Insurance Co. vs. Cochran, 27 Ala. 228.

So the \$4333.50 may justly be considered and held to be the balance of a demand against the bank based upon the implied promise to pay the reasonable value of the attached property, having already paid on this implied promise to pay \$6522.00 the sum of \$2188.50 by applying it on the judgment recovered by the bank against the bankruptcy and his wife.

Consequently, for the purpose of set-off against the bank's judgment, the question of tort may be eliminated and let the inquiry proceed on the theory that the law raises the implied promise of the bank by and from the acts of itself and the sheriff, its agent, to pay bankrupt the reasonable value of his property, since it was wrongfully taken, wasted, destroyed and injured.

In re Hinschman, 104 Fed. 69;
4 Am. Bankr. Rep. 715.

The presumption of payment and satisfaction of the judgment to the extent of value of property wasted, destroyed, or injured, by the sheriff, must rest upon the principle enforced in the cases authorizing recovery as upon an implied promise.

POINT VI.

Notice should have been given to Mrs. Pindel of petition for order of sale, and also to creditors. The

bank's claim should have been allowed or disallowed before order of sale, since subsequent to bankruptcy adjudication the estate had become solvent, and since the year for filing claims had long before expired. The bankrupt and his wife, since the estate had become solvent, should have been given an opportunity to pay the entire estate's liability before a sale was ordered. And neither the bankrupt or his wife could pay estate's entire liability until it was ascertained and fixed by the court. Since the Bank of Nez Perce and Trustee forced the sale without first forcing action on the bank's claim, since the purchaser is the bank's president, and since the homestead sold for only \$10,500.00 when it was worth \$15,000.00, the sale should be disaffirmed, and bankrupt be permitted to pay in full.

AUTHORITY UNDER POINT VI.

Mrs. Pindel was interested in the homestead. The husband has a vested interest in a homestead, taken from the separate property of his wife.

Blood vs. Munn, (Cal.) 100 Pac. 694.

She, therefore, was entitled to notice of the time and place of hearing the petition on which the ex-parte order of sale was made, and, not having had such notice, her property is taken from her without

due process of law if the sale of her homestead to Mr. Collins be confirmed.

“The power of the trustee to sell and convey the bankrupt’s estate depends wholly upon statute, and a sale in any other manner than as therein prescribed would be a nullity.”

Black on Bankruptcy, p. 160.

The application to sell is made by petition, and Referee sets a day and place for hearing the petition and must give ten days’ notice to creditors as required by the Bankruptcy Act, and evidence for and against the proposed sale may be received.

Loveland on Bankruptcy, pp. 570-571.

If Mrs. Pindel had been notified before the order of sale was made, no doubt but that she would have demanded the settlement of the controversy as to the allowance of the claim of the Bank of Nez Perce, and would have offered to pay all liability of the estate in full as soon as it was ascertained. She had a right to make this defense to the granting of the order of sale. She was not given the opportunity; therefore, is not the sale to Mr. Collins absolutely void?

The bankrupt himself has appeared in opposition to the confirmation of the sale, and, whenever the total liability of the estate is ascertained, he offers to pay it in full to the trustee, and, to show his equity

to do as he offers, he has shown by witnesses, other than himself, that his homestead's value has increased to \$15,000.00.

"The contest, with reference to validity of a sale, is usually made at the time of the application to the court to confirm the sale. The court may refuse to confirm the sale for mere inadequacy of price. It is not necessary that there should be fraud or even gross inadequacy of price as to be evidence of fraud."

"The court of bankruptcy has power, in its discretion, to set aside a sale even where such sale has been consummated by delivery of deed. In case money has been deposited or paid, it should be ordered to be returned by the trustee. Thus a sale may be set aside on the ground of fraud or collusion, or because the sale is illegal, as in not selling to the highest bidder, or selling property unlawfully in the possession of the Trustee, or made under an illegal or irregular order. Sales have also been set aside for mere inadequacy of price."

Loveland on Bankruptcy, pp. 579-580.

In connection with the subject under consideration, it is to be noted that, if the sale had been confirmed and the bankrupt had not appeared against the confirmation of sale and asked the trial of the controversy over the claim of the bank, not one dollar of the \$10,500.00 could have been ordered paid on the claim of the bank so long as it was not allowed as a claim against the estate.

Then why did not the bank press the matter of the allowance of its claim first and thereafter demand,

in conjunction with Trustee, the sale of the property, if it's claim was allowed? This question may also be put to the trustee.

A reasonable answer to the question is as follows: Both the bank and Trustee were afraid of the reasons that had so long postponed the allowance of the bank's claim wiping out the claim, and evidently they considered that an advantage would be secured by first forcing the sale of the homestead and thereafter pressing the matter of the allowance of the claim to a conclusion.

Both the Trustee and the bank knew, so long as the controversy as to bank's claim was unsettled and undecided, that neither the bankrupt nor his wife could and would pay it and the bona fide liabilities of the estate to prevent the sale of the homestead, and seemingly it was thought best to so manage the affairs as the get bankrupt's homestead at a reduced price, and then, there would be from four to five thousand dollars profit on the sale, and the bank would still be the gainer, though its claim was thereafter disallowed on a final hearing.

The bank may attempt to answer this suggestion by citing the order of May 20, 1911, which the learned United States District Court says was made on the assumption that the estate owed the judgment to the

Bank of Nez Perce. But that assumption never allowed the claim of the Bank of Nez Perce against the estate, nor did it cut off the right of the bankrupt or of his wife to object to the allowance of the claim which bank filed against the estate.

The claim is not finally allowed before the close of the estate. For the allowance may be reopened and the claim rejected in whole or in part, as already stated, at any time before the estate is closed.

Sec. 57 Bankruptcy Act, subdivision k.

The claim was not filed until long after the institution of the proceedings, resulting in the order of May 20th, 1911. And that was not a final order. If the subsequent increase in the value of the homestead was so great as to make the estate solvent even though it owes to the bank \$3294.53 allowed by the United States District Court, the claim should have been adjudicated before the sale of the homestead so as to give bankrupt or his wife an opportunity to pay all debts of estate, or to deposit with Referee an estimated amount, deemed sufficient to cover all liability.

The order of sale states no terms of sale; therefore, the terms must be held to be cash. But the notice gives terms of sale as follows: Ten per cent cash and 90 per cent on credit and giving until final

confirmation to pay the 90 per cent. If, therefore, the 90 per cent be not paid on final confirmation, the Trustee would have had to sue purchaser. There was no security required for payment of the 90 per cent. The ten per cent was not enough to amount to the \$5000, or homestead exemption. And Trustee had to have cash in hand to pay this exemption to bankrupt. Trustee could not force bankrupt to take chances on this \$5000.00 nor make him wait until settlement of a dispute which might arise over confirmation of sale.

The order invited litigation over confirmation of sale by directing certain expenses to be taken from the \$5000.00 exemption. This would chill the bidding at the sale. The Trustee shows his unfairness by attempting to take a great sum of money from bankrupt's exemption of \$5000.00, making it necessary for bankrupt to contest the report and thereby resulting in extending the time for payment of the 90 per cent credit. The purchaser has had over a year within which to pay 90 per cent of his purchase price. So it must be held that the part of the order of sale requiring these expenses to be deducted from the \$5000.00 exemption is prejudicial since its purpose seems to be to rob the bankrupt and, at the same time, to indefinitely prolong the period of credit on the 90 per cent of the purchase.

In this connection, it is well to remember that the value of the homestead has been rapidly increasing and that therefore it is neither just nor right to get an order of sale which invites a report of sale that must result in objection to its confirmation and a procedure on sale which seemingly was intended to prolong the period of credit. For the Trustee knew that the bankrupt would not fail to object to a sale which would rob him of a great part of his exemption if the report of sale was confirmed as reported by Trustee.

Such an unfair and unjust sale should not be confirmed by the court.

That \$5000.00 of the purchase price must be cash at time of sale, we cite:

Wood vs. Wheeler, 11 Tex. 122.

POINT VII.

The execution sale on the 6th of April, 1909, was absolutely void.

Section 2047, Revised Codes of Idaho;

Fletcher vs. Morrel. (Mch.), 44 N. W. 133;

Kent vs. Roberts, 14 Fed. Cas. No. 7, 713;
2 Story, 591;

35 Cyc. 1543-1544-1545.

After judgment attached property must be sold on execution.

Subdivision 2 Sec. 4315, Revised Codes of Idaho.

The judgment was rendered on the 15th of February, 1909, and the execution issued on the 8th of March, 1909. Mr. Harry Lydon was not the sheriff after the second Monday of January, 1909, and he had no more authority to sell the property on an execution issued on the 8th of March, 1909, than any other private individual.

POINT VIII.

The Bank of Nez Perce on the 10th of July, 1908, was given the right to sell attached property at private sale but it repudiated the opportunity and precipitated the litigation that thereafter followed. This fact is important in the matter of overcoming the propositions of the United States District Court which seem to shoulder all blame on Mrs. Pendel, and excusing bank all liability.

ARGUMENT.

We feel that the case has been argued in the statement of the points and in the citation of authority

under the points. So, therefore, we consider that we should avoid repetition as much as possible, at the same time, begging the court to note that we waive no point we have presented by not further arguing any point in this presentation under the sub-head of "Argument."

We know that this brief is already extended and probably more voluminous and comprehensive than it should be, but we feel that the learned United States District Judge has committed many grievous and prejudicial errors against the bankrupt's estate as represented by the bankrupt in the matter of the allowance of the claim of the Bank of Nez Perce as well as against the bankrupt in the other matters considered by the learned District Court, and therefore we think we are not subject to criticism, since we are honestly endeavoring to have corrected what we sincerely and honestly contend are errors which deny justice to the estate of the bankrupt as well as to him individually.

We feel that we must bring to the attention of the court the irreconcilable inconsistencies in the opinion of the learned District Judge.

He first reached the conclusion of law that relief for the wrongful attachment is a counter claim within the meaning of section 4184, Revised Codes of Ida-

ho, and that, because that relief was not had in the original action, section 4185, Revised Codes of Idaho, causes the judgment of the bank to conclude "all claims for wrongful attachment," and then and thereafter, toward the close of his opinion he reaches the other conclusion of law that the estate of the bankrupt has no demand against the bank which is, or can be, a set-off in favor of the estate under section 68 of the Bankruptcy act, and, to prove his conclusion of law, cites *In re Becker Brothers*, 139 Fed. 366, and fails to consider the case of *In re Harper*, 175 Fed. 412, which conclusively demonstrates that the holding in the case of *In re Becker Brothers* is wrong and not law.

One or the other of these conclusions of law must be absolutely wrong. For, a careful reading of the *In re Becker Brothers* will disclose that the damages were those claimed against a landlord, and, under the Pennsylvania statutes, could not be, or become, the subject of litigation in a case in the state courts, maintained by the landlord on the same rent for which he filed his claim against the estate of the Becker Brothers; but, in his opinion here, the learned District Judge had already reached the conclusion that "all claims for wrongful attachment" of personal property were "concluded" by the judg-

ment of the bank, rendered in the state court. So strongly was he impressed with the idea that "all claims for wrongful attachment" were counter claims within the meaning of subdivision I of section 4184, Revised Codes of Idaho, that he extinguished them by section 4185, Revised Codes of Idaho.

But the conclusion of the learned Judge that "all claims for wrongful attachment" are counter claims within the first subdivision of section 4184, Revised Codes of Idaho, and, therefore, by section 4185, Revised Codes of Idaho, extinguished, or merged in the judgment, is absolutely erroneous. We confidently affirm that the case of *Willman vs. Friedman*, 4 Idaho 209, decides nothing of the kind; *yet, the learned District Judge says that it does.*

To emphasize our point, we ask the court to carefully read the *Willman* case and find where it says one word about sections 4185, 4184, *supra*, and section 4183, Revised Codes of Idaho.

The right of the defendant to recover for wrongful attachment by cross-complaint, or by way of cross-complaint, or by way of cross-action, in the original action, wherein the wrongful attachment was issued, was the only question at issue, or decided, in the *Willman* case, and section 4188, Revised Codes of Idaho, was the only Idaho statute considered or construed.

The question under section 4185, *supra*, could not arise in the Willman case, at all; for the Willman case was not an action maintained against the plaintiff, independent of the original action, wherein attachment was issued.

We ask the court to carefull read the first subdivision of section 4184, *supra*, and the second subdivision of section 4183, *supra*, and all of section 4188, *supra*, and in connection with their reading also *to carefully read the case of Brosnan, et al vs. Kramer, et al., (Cal.)*, 66 Pac. 979-981, and notice that a wrongful attachment, and claims growing out of a wrongful attachment, do not arise out of the cause of action, or transaction as to the note "set forth in the complaint" of the Bank of Nez Perce "as the foundation" of its claim in the action in the state court, asking for a judgment upon its note, and do not arise out of the "subject of the action "of the Bank of Nez Perce in the state court against the bankrupt and his wife, which subject of the action was the note. In the Brosnan case, the Supreme Court of California very carefully marks these distinctions and qualifications in passing upon the question as to whether an independent action can be maintained on a claim which the defendant in that case contended should have been tried and settled in

a case that they previously had maintained against the plaintiffs' decedent.

Now, returning to section 4188, Revised Codes of Idaho, we first mark the fact that its words are not, at all, the same as the words of section 4184, *supra*, and section 4185, *supra*, does not, at all refer to section 4188.

We find that section 4188 authorizes the filing of a cross-complaint at the same time of filing the answer, or subsequently by permission of the court, setting forth cross-demands against any party to the action for affirmative relief" as to matters "affecting the property to which the action relates." These words to which we call specific attention are not found in section 4184, *supra*, at all.

Now, it must be noted that whenever the Bank of Nez Perce attached the personal property of the bankrupt it made its action *relate* to the property attached, and the relief for matters "affecting" the property attached was relief on account of the property to which the bank's action related. Consequently, when the Supreme Court of Idaho merely decided that under section 4188, *supra*, the defendant could file a cross-complaint and recover against the plaintiff for wrongful attachment, it did not decide that, if a cross-complaint was not filed, and relief had, that

section 4185, *supra*, merged "all claims for wrongful attachment" in the judgment recovered by the plaintiff. In the Willman case, the Court merely decided that for wrongful attachment the defendant could recover on cross complaint in the original action.

Again, section 4185, *supra*, merely prohibits independent actions subsequently maintained against the former plaintiff on counter claims, arising under subdivision I of 4184, *supra*, and does not pretend to prohibit the use of these counter claims as a set-off in an action maintained by the former plaintiff against the former defendant. The bankrupt's estate is not now maintaining a new action against the Bank of Nez Perce; the estate is merely opposing the allowance of the judgment as a claim against the estate; the action of the estate is absolutely defensive; the estate maintains no action as a plaintiff against the Bank of Nez Perce. And it is only new independent actions that section 4185, *supra*, prohibits; consequently, section 4185, *supra*, for this reason alone, does and cannot refer to proceedings under section 68, Bankruptcy Act.

After the learned District Judge reached the conclusion that the judgment "concluded all claims for wrongful attachment," he says: "But were it oth-

erwise, undoubtedly the second attachment was valid, and the evidence is insufficient upon which to base a finding of damages on account of the execution of the first writ." The court's idea here seems to be that the second attachment is a complete defense simply because it is valid. *This is not the law.*

4 Cyc. 832, and note 12;

Files vs. Davis, 119 Fed. 1002;

Ruthven vs. Beckwith, (Iowa), 45 N. W. 1073;

Empire Mill Co. vs. Lovell, (Iowa), 41 N. W. 583;

Mayer vs. Duke, (Tex.), 10 S. W. 565.

The rule that the difference between the value of the property at the time it was wrongfully attached and the amount it sold for on execution is the measure of the recovery, after execution, for wrongful attachment, which difference is \$4665.75, but reduced by the \$57.00 and the \$131.50 to \$4333.50, as we have already stated. This difference could not be ascertained until after execution sale, and, consequently, the cause of action on this rule would not accrue until the execution sale; so, it was utterly impossible for the bankrupt to have recovered the \$4333.50 in the original action in the state court under any section of the statute, simply because the right to re-

cover the \$4333.50 did not accrue in time to present it by cross-complaint in the original action.

This rule which gives the difference between its actual value and what the attached property sold for on execution and the court's order of sale is based upon just and equitable principles. It admits the right of the plaintiff, who first seized the attached property wrongfully, to subsequently attach it and sell it on execution sale or order of court in attachment proceedings without returning it to the attachment defendant but he must sell it for its actual value on execution and attachment sales, *and, if he does, there can be no recovery for the wrongful attachment.*

Closely related with these principles of the law, there is the other principle that the plaintiff is responsible to the defendant for all waste and destruction of, and injury to, the property while in the hands of the sheriff for the purpose of applying it by legal process to the payment of the judgment. Taking note of the fact that there was great waste of the bankrupt's property, it will be seen that it was impossible for the bankrupt to receive the actual value of the property at time of the attachment on the execution sale, and, therefore, the reasons for applying the rule of such cases as are cited last above becomes apparent.

This brings our argument logically to that rule which holds that a judgment is satisfied to the extent of the property seized where there has been waste and destruction. The learned District Judge absolutely overlooked this proposition of payment, but the Honorable Referee did not.

The Referee says: "*It might also be said that the judgment has been fully paid and satisfied (17 Cyc. 1395-1396 and notes 44-45-48-49; Banks vs. Evans, 48 Am. Dec. 734; Brown vs. Kidd, 34 Mich. 291. The attaching plaintiff has levied on \$6522.00 worth of personal property to satisfy a judgment for \$3636.15 or some \$3,000.00 more than enough to satisfy the judgment. The levy of an attachment or execution on sufficient personal property of the judgment debtor to pay the judgment amounts prima facie to the satisfaction of the judgment (23 Cyc. 1488-1489, Freeman on Judgments, Vol. 2, 4th Ed. pp. 819-'20, Sec. 475, p. 817. The amount of personal property is so much greater than the amount of the judgment that it would only be justice and equity to hold that it has been satisfied under the facts in this case. I agree with counsel for both sides that there has been much litigation since the 24th day of July, 1908, over this matter, but that does not excuse the destruction of so much property.*"

Since the learned District Judge overlooked this principle of law altogether, it must be presumed that, if he had considered it, he would have held with the Referee. If he had not overlooked it, doubtless, he would not have proposed so many questions as to statutes of limitation, nor would he have considered, at length, set-off and counter claim, and it is to be presumed that, if he had noticed this proposition of satisfaction of the judgment, he would have reached the conclusions that his propositions which he makes and advances are not sufficient to overcome the defense of payment and satisfaction of the judgment under the rule of law above invoked by the Referee as to payment and satisfaction of the judgment.

The Referee is an able and skillful lawyer; his opinion shows him to be. He patiently listened to the testimony of the witnesses; he saw them testifying; he is better able to know the exact facts and conditions than any court which may briefly go over the evidence as it appears on paper and who does not listen to the oral testimony and who does not see the witnesses. He was in a much better position to understand the great amount of waste and destruction of property than was the learned District Judge, and therefore, no doubt, the learned District Judge did not attempt to dispute the findings of fact of the Ref-

eree, but rested his decision, overruling the Referee, upon statutes of limitation and technicality, absolutely. But statutes of limitation do not run against payment, nor is set off or counter claim involved in payment.

It has been necessary to transcribe some of the evidence to show the error of the District Judge when he says that the letter—Bank of Nez Perce's exhibit, 19—is the sole evidence of the contract or agreement between Mrs. Pindel and the Bank of Nez Perce for the sale of the attached property at private sale, which agreement the bankrupt asserts, and the Referee finds, was made on the 10th of July, 1908, before Mrs. Pindel employed a lawyer. See evidence of Mrs. Pindel, trans. 53, 54, 55, and evidence of Mr. O'Neil, trans. 56, 57.

The Referee finds that: "When Mrs. Pindel came back from Boise she went to the office of E. O. O'Neil, attorney for the bank and she and Mr. O'Neil agreed to have the property taken under attachment sold and the purchase price applied upon the debt; this was on the 10th day of July. Mr. Dowd was called on the 'phone and told of the agreement, and Mrs. Pindel borrowed some stationery from Mr. O'Neil and made a written statement of the terms of the agree-

ment and mailed it to Mr. Dowd, (this is creditor's exhibit 19)."

But, discussing this feature of the controversy, the District Judge says: "It is said that after the attachment was levied the bank violated an agreement it made with Mrs. Pindel for the sale of the attached property at private sale. The facts relied upon are evidenced solely by a letter written by her to an officer of the bank, and it is only necessary to say that no agreement is disclosed. The letter is wanting in the essential elements of a contract and amounts to nothing more than an indefinite conditional proposal." And the court overlooks the fact that only consent on the part of Mrs. Pindel was necessary to give bank right to sell attached property at private sale and to apply proceeds to payment of debt.

But let it be considered that there was only an indefinite conditional proposal, and that an agreement was not made before the letter was written, yet five hogs were sold under it to Dan Morgan, and the Bank of Nez Perce pocketed the purchase price and has not accounted for it to this day, *and Mrs. Pindel found a purchaser for one of the small teams of horses and Mr. Dowd turned the sale down.*

The referee finds that: "Under this agreement five head of hogs were sold by Mr. Dowd to Mr. Mor-

gan on the 14th of July. On the 17th of July, Mrs. Pindel called up Mr. Dowd and told him she had a buyer for a small team, but Mr. Dowd told her that if she wanted to sell any more she would have to deal with the sheriff. Mrs. Pindel then secured the services of Attorney I. N. Smith and he filed a demurrer on the 24th of July. The first attachment was quashed and a second attachment issued on August 13th."

The letter, properly punctuated to make its meaning clear, referred to by the Referee and by the District Judge, which was written after the agreement and plan for the settlement and payment of the note and expenses were made at Mr. O'Neil's office on the 10th of July, 1908, is as follows:

"July 10, 1908,

I saw Mr. Harry Lydon today and told him the hogs you had attached was in need of feed and I thought best to have them sold to save feed bills on them and, if you are willing to sell them at a fair price and give me credit on the note, do so; also you can have the 200 hundred acres of crop if we can agree on the price of the crop; also some of the small teams, the small teams. Wiley Wagner wants a team. Probably, Johney Klaus would give you a good price for the crop. I will pay as I can. I think probably we can sell enough to settle the account in

full. I want the hacks and buggy sold and the two year old stallion and all of the small teams and now is the time to sell before Harvest. MRS. SARAH PINDEL, do the best you can."

Keep in mind the fact that the arrangement for the sale of the attached property had been agreed upon before Mrs. Pindel wrote this letter, and that this letter was to be Mr. Dowd's written authority to sell the attached property; it was written so that the terms of the arrangement for payment and settlement would not be forgotten. And, of course, the Bank of Nez Perce was not given the arbitrary authority to sell the property at any price, but Mrs. Pindel was to have something to say about the price for which the property would be sold. She says: "We can sell enough to settle the account," meaning that she too was to have some voice in the price for which the property was sold.

When Mr. Dowd told her that, if she wanted to sell "any more she would have to deal with the sheriff," he meant that he would not go on with the arrangement for the sale of the property at private sale, and that he would make no further effort, at all, to agree with purchasers on the price of the property to be sold, thereby to consummate further sale at private sale. This was a repudiation of the authority he had

under the agreement and under the letter. There is no doubt about it.

Of course, Mrs. Pindel did not sell the property to the bank in settlement of the debt; it was only an arrangement for the sale of the property at private sale by the bank and Mrs. Pindel, acting together. Therefore, all had to agree and consent to each sale to each purchaser. It was impossible to fix a fast price for each piece of property, and agree that it should be sold at that, but the idea was to sell to purchasers for prices satisfactory to both Mrs. Pindel and the bank.

This gave the bank an opportunity to make a good faith effort to secure these sales of the attached property to purchasers at private sale and thereby avoid litigation and expenses.

The bank acted in bad faith. It forced, as found by the referee, Mrs. Pindel to employ a lawyer; it is responsible for all the litigation and expenses. So, therefore, the repudiation of its authority under the letter puts all blame on it from this time on to the present. The destruction of property was subsequent to Mr. Dowd's repudiation of the opportunity given to him by Mrs. Pindel for sale of attached property at private sale and for avoidance of all litigation and expense.

Consequently, viewing responsibility now from the standpoint of bank's opportunity to get payment of its debt from the proceeds at private sale of the attached property, and seeing its own repudiation of that opportunity, it does seem that there can be no debate about it being liable to the bankrupt's estate for the waste and destruction of the property under some rule of law—liable either under the payment theory or under the counter claim or set-off theory.

Again, to measure the bad faith of the bank, let us quote the Referee's finding as follows: "The trustee under the direction of Mr. O'Neil seized a large amount of personal property not scheduled in the bankrupt's petition and without an order of the referee, which said property was afterwards claimed by the bankrupt's wife and as such was set off to her by the judge of this court, which order was affirmed by the Circuit Court of Appeals."

It seems to be the idea of the bank's crowd to annoy and harass the bankrupt and his wife all they can, and to make them all the cost and expense possible. These things must be considered, and also the fact that no one defended bankrupt's property but his wife while he was in the penitentiary at Boise, Idaho. She gave bank chances to get payment. These chances to get payment of the note and ex-

penses without litigation and the expenses of litigation make the repudiation of the arrangement for sale of the property at private sale emphasize the proposition that it is not right for the court to look everywhere to find some technicality of law to authorize the denial of justice to the bankrupt's estate.

After Mr. Dowd had repudiated the July arrangement to get the debt paid without litigation and expenses of litigation, he levied a second attachment on the property, and the waste and destruction continued. It seems, under these facts and considerations, to be unreasonable to deny the right of the estate to try the case on the merits simply because the bank might not now have the right to sue the sheriff and his bondsmen, or simply because the trustee, who has acted under the orders of Mr. O'Neil—the bank's attorney could not maintain a "plenary" action against the bank on account of section 4054, Revised Codes of Idaho, barring such action.

The learned District Judge says: "True, such suits are often harsh and entail much unnecessary loss, and here the waste of property in expense of litigation, and the deterioration incident to seizure and sale under judicial process, is most deplorable, but for the most part the defendants to the action

must themselves bear the blame." And, straightway, the learned judge puts all the loss against the bankrupt's estate simply because he thinks that Mrs. Pindel" started out with the purpose of evading their just obligations to the bank," and cites the fact that she sold some cattle, which the Referee finds were her own, and out of the proceeds of which she did not pay the note. The learned judge here overlooks the letter and the willingness of Mrs. Pindel to have the note and expenses paid by private sale of attached property.

The learned judge should not excuse the "most deplorable" deterioration of the property which was seized on process of court simply because Mrs. Pindel did not pay the note with the proceeds of her own cattle. We think he should have considered the bank's opportunity to get pay by private sale of the attached property, and Mr. Dowd's repudiation of that opportunity, and have seen that the fault was with the bank for the litigation and expenses and the "most deplorable" deterioration of the property from July 24th, 1908, and down to the present time. Mr. Smith filed the demurrer on the 24th of July and on the 17th of July Mr. Dowd repudiated his chance to get the bank's debt paid by private sale of attached property.

There are many reasons why Mrs. Pindel did not want to pay out her money, if the indebtedness could be settled by private sale of the attached property. She wanted to get her husband pardoned; that would occupy her time; indeed, she neglected the defense of the action so absorbed she was in the matter of securing a pardon; she was not at the trial; the Referee finds that: "Mrs. Pindel returned again to Boise to take up the matter of the pardon of her husband and in her absence and in the absence of her husband on the 15th of February, 1909, a trial was had and a judgment was entered against the bankrupt and his wife for \$3635.16."

The Referee also finds that Mr. Pindel, before she executed the note, was "asked for a note, signed by his wife as an accommodation payer; that after much argument and persuasion Mrs. Sarah E. Pindel was induced to sign the note; this note was payable on demand."

Thus, it appears that Mrs. Pindel was not, in fact, liable on the note under the laws of Idaho.

And it must be presumed that she was defending on that issue, but she did not attempt to do so until after the repudiation by Mr. Dowd of the July arrangement for settlement and payment of the note with the proceeds of the attached property at private sale.

She saw there was under-hand-dealing, and that she had made a mistake by going to Mr. O'Neil on the 10th of July, 1908, and attempting to put herself into the hands of the bank, and its officers; she evidently believed they would give her a "square deal" but, when Mr. Dowd deliberately repudiated the opportunity she had given him she, evidently, concluded that she would not get a "square deal" and, therefore had to fight in court for her rights and the property.

Again the Referee finds that "Mrs. Pindel went to Boise during the month of June of the same year," (1908). "to consult with her husband about securing a pardon and in regard to settlement of his business affairs. Both Mr and Mrs. Pindel testify that they talked over the sale of Mr. Pindel's property for the purpose of paying off this note. While she was away, the bank brought this action, and on the 27th of June had an attachment issued."

So the property of Mr. Pindel was to be sold by Mrs. Pindel to pay the note, and when Mrs. Pindel found his property had been attached, she immediately went to the attaching plaintiff to arrange for its sale to pay the note, but, for some reason, after agreeing to such an arrangement or plan. Mr. Dowd repudiated it and forced Mrs. Pindel to defend herself and her husband's property.

Judging the motive by subsequent actions of the officers of the bank and their persistent effort to get title to the homestead before the matter of the allowance of its claim is finally settled, it is their purpose to punish Mrs. Pindel very vigorously for daring to resent their repudiation of the July plan for settlement of the note by private sale of the attached property by destroying the attached property and thereafter proceeding against the homestead or else, as found by the Referee, it was their purpose in protesting against Mr. Pindel's pardon to make Mrs. Pindel dig "up," since Mr. Dowd, evidently thought that she should pay the note with her own money. It is hard for the bank on the facts to convince an impartial mind that it gave the Pindels a "square deal."

The court says: "The impropriety of the course here pursued is shown in the failure of the Referee to make any finding as to the amount of the counter-claims. He simply finds that they exceed the bank's claim, but if they may be waged as counter claims at all, and if this proceeding be adopted as a method for the liquidation of the damages growing out of the alleged torts, they should be fully liquidated and determined so that the estate may have the benefit of the surplus, if any there be, after off-setting the claims of the bank."

We may criticise the proposition to show that the Referee did exactly right.

For the proposition omits to take into consideration the rule of law as to payment and satisfaction of a judgment where there has been waste and destruction of property, and it omits to take into consideration the fact that the Referee finds that the property, when first attached, was of the value of \$6522.00 and that the residue was sold on execution for about \$2,000.00; some sold on order of court at \$131.50, and some sold by private sale at \$57.00. Therefore, the difference between the \$6522.00 and the sum of the other amounts, is the amount of the "damages," found by the Referee, which is \$4333.50, and that amount does exceed the judgment; *that amount will draw interest* from the date of the execution sale just the same as the judgment.

Again, we do not know how there can be any judgment given for the surplus in the proceeding on the allowance of a claim. Anyway, if the learned District Judge has here presented a good point, he should have returned the case to the Referee to supply the findings necessary on this point. But the bankrupt's estate makes no complaint on this matter of not receiving a judgment for the surplus over payment of the judgment, and his estate doubts the jurisdiction

of the Referee under section 68, Bankruptcy Act, to give estate any affirmative relief against Bank of Nez Perce.

The learned judge, as noted in the beginning of the argument, holds that the claims of the bankrupt's estate against the Bank of Nez Perce are unliquidated damages and are not a set off within the meaning of section 68 of The Bankruptcy Act, subdivision a, and we need not now repeat the points we made in the beginning of the argument, but we want to say that the court's view is erroneous. For the Referee had jurisdiction and authority to hear the evidence and thereupon to liquidate the claims of the estate against the bank and, if he found that the amount of the claims of estate exceed that of the bank, thereupon to disallow the judgment of the bank as a claim against the bankrupt's estate.

In re Harper, 175, Fed. 412.

In re Becker Brothers, 139 Fed. 366, is discussed in the Harper case, and clearly shown to be wrong. The reasoning in the Harper case is sound and unanswerable, and should be adopted in the case at bar. If it is not followed here a great wrong will be done to the bankrupt's estate, and a bad precedent established as was in the Becker Brothers case.

The court must not overlook the fact that it is not the bankrupt individually defending, or objecting, but the bankrupt, as it were, is now acting as the trustee of his own estate instead of the actual trustee who it must be presumed, refuses to defend the bankrupt's estate. The individual rights of the bankrupt must not be mixed and confused with the rights of his estate. When this point is comprehended and understood, the propositions of fraud and estoppel, advanced by the learned District Court, estop the estate of the bankrupt to defend against an unjust claim. In this matter of estoppel and fraud, the rights of the creditors of the estate must be taken into the account. If a bankrupt can thus estop his estate to make defenses against the allowance of claims and thereby give payment of a judgment out of the estate which has been paid, or against the owner of which the estate has a set-off, larger in amount than the judgment of the creditor, it will be seen that the court vests in the bankrupt the right to defraud *the creditors of his estate* by withholding set-offs or payment from his schedules, and by not bringing the trial on quickly after he so omits these things from his schedules, and orally informs the Referee. *The bankrupt by the rule would be given power to prefer a creditor as well as to defraud other creditors by helping one creditor to get payment twice.*

Thus the learned District Court is establishing the procedure that a bankrupt can, by withholding true defenses to the allowance of claims, give certain *avored creditors a preference over other creditors of the estate*. Suppose, the value of the homestead had increased to only five hundred dollars above the exemption of \$5000.000, and suppose the estate is estopped from making the defenses which prove conclusively that the claim of the bank of Nez Perce should not be allowed as a claim against the estate, and its claim is allowed in the amount directed by the District Court, the fact of the preference, at once, appears; and the conduct of the bankrupt produces the preference of the Bank of Nez Perce over the other creditors of the estate, even though, in fact, the judgment of bank is paid.

For the courts to establish such a rule of law is dangerous, indeed, and proves conclusively that the estate cannot be estopped in the matter of the allowance of claims against the estate by anything which the bankrupt, or his wife, may have done, or may have omitted to do in bankruptcy proceedings.

If another creditor of the estate was making the defense for the estate, he would be making it for the benefit of the estate and not solely for his own benefit, and principles of estoppel which apply to him in-

dividually and not to the estate, at all, certainly, could not be invoked to estop the estate of the bankrupt, and be made the means of giving a creditor the allowance of a claim against the estate which upon the merits should not be allowed at all. And the bankrupt makes the defense for his estate as well as for himself.

The bankrupt, as appears in the petition for bankruptcy and schedules, shows that there was a homestead declaration filed, and that he claimed the homestead as exempt because it then had no value above \$5000.00. If this were true there was then nothing for his creditors. At the time of filing his petition the bankrupt also had the right to bring an action for injunction against the enforcement of the judgment on the grounds that it was paid as well as on the ground that he had a just claim of \$4333.50 against the bank. The bankrupt did not do this. But, if he had done so, who will hold that he did not have the injunction remedy? *And who will hold that the court would not grant a perpetual injunction against the enforcement of the judgment upon the facts found by the Referee?* If bankrupt had this right upon the facts found by the Referee in the state court, he and his estate have a right to now have the bank's claim disallowed in bankruptcy proceedings.

The same question is now before the bankruptcy court, and, in effect, the estate of the bankrupt by asking a disallowance of the judgment of the Bank of Nez Perce because of the facts found by the Referee is asking a perpetual injunction against the enforcement of the judgment against the estate of the bankrupt. The bankrupt has already been discharged, personally, from the enforcement of the judgment, and, if the facts, found by the Referee are accepted, that discharge in Bankruptcy is the most *equitable and just discharge any bankrupt in all the world has ever obtained*; yet, the District Court has branded it as a fraud.

If the facts found by the referee are given their full force and effect against the Bank of Nez Perce, presumably, it would seem, the District Court brands Frank M. Pindel as a defrauder because of the fact that the bankrupt's estate, in equity, in justice, in right, in law, does not owe the Bank of Nez Perce one cent of money and, too, because the bankrupt was discharged from a debt he did not owe. *Such reasoning is against reason, and the conclusion of fraud by securing a discharge from judgment, the enforcement of which, in the state court, could have been perpetually enjoined, cannot be accepted as a reason for allowing the judgment against the bankrupt's estate.*

That the judgment could not be enforced in the state courts against Frank M. Pindel, if he had proved the facts in an injunction action which he has proved before the Referee, showing payment of \$4333.50 in addition to what was realized on private sale, on order of sale on attachment and on the execution sale, which was \$2188.50 needs no authority to establish. *For a paid judgment cannot be enforced by execution.*.. And a paid judgment cannot be allowed as a claim against a bankrupt's estate.

And, furthermore, in connection with this question of estoppel, it must be noted that all the acts upon which the estate depends in the bankruptcy proceeding at bar, as constituting payment, or giving a set-off of \$4333.50, happened before the institution of bankruptcy proceedings, and that, therefore, there is nothing, whatever, which the bankrupt could do in instituting the bankruptcy proceedings, or has done subsequent to the institution of bankruptcy proceedings, that can, in the least, change these acts existing previously, or lessen the rights of the estate against the judgment of the Bank of Nez Perce.

The point is this: Nothing which the bankrupt did in instituting the proceeding in bankruptcy, and subsequently, made the note, or obligation, on which judgment was obtained in the state court—that was

a pre-existing indebtedness—and nothing which the bankrupt did in instituting the proceedings in bankruptcy, and subsequently made the payment of the judgment, or the set-off of \$4333.50—that was pre-existing.

So the idea of estoppel must fall as not being supported by anything, whatever. And as the idea of fraud rests upon the same grounds as does the idea of estoppel, both must be abandoned by the court. Evidently, the learned District Court overlooked these facts and propositions which establish that his ideas of fraud and estoppel have no grounds, whatever, upon which to stand and to be sustained.

The act of Frank M. Pindel in going into bankruptcy took nothing, whatever, in so far as concerned his property, from the Bank of Nez Perce; that act of going into bankruptcy merely changed the remedy of the bank and bankrupt to the Bankruptcy Court; instead of now enforcing the judgment by execution under the state laws, the bank secured the remedy, if its judgment can be collected, of enforcing it against the estate of the bankrupt by filing it as a claim and having it allowed, and paid in due course of bankruptcy administration.

This change of remedy was no fraud; if it was, then no man can go into bankruptcy without committing

fraud, and depriving his estate of all defenses against all claims, filed against it. And furthermore, if going into bankruptcy and securing a discharge from a judgment—not satisfied of record—is a fraud which prevents the estate proving payment, or a set-off to the amount of \$4333.50, larger than the judgment, then such fraud will give a preference to such judgment creditor, and unjustly reduce the amount of the estate, and, too, every bankrupt who obtains a discharge from such a judgment has committed fraud though he does not, in fact, owe one cent on the judgment. *The proposition is absurd. The reasoning which leads to the conclusion of fraud and estoppel is unsound.*

This reasoning upon the facts found by the Referee and stated in the Court's Opinion makes the district court give a new meaning to fraud and estoppel. *For the premise, necessarily, upon which the court bases the fraud and estoppel, is that the facts now before the court, if accepted, and if the proper remedy is given to the estate, will result in a fraud upon the Bankruptcy Court and upon the Bank of Nez Perce and, therefore, the claim of the bank must be allowed although the facts show it should not be allowed. Consequently to prevent the fraud, the claim must be allowed against the estate although, in fact, the es-*

tate owes the bank nothing. *Estoppel always estops the truth.* If this is not a fair statement of the position taken by the learned District Court then we have done him an injustice, and we most sincerely beg his pardon; for we do not want to be unjust with the court. We have felt it absolutely necessary to force the District Court's premise to the logical conclusion to demonstrate that there is nothing upon which to base his charge of fraud and the estoppel against the bankrupt's estate, since he bases them on mere irregularity in some of the bankruptcy proceedings.

We shall next consider the question of the validity of the execution sale made by Harry Lydon on the 6th of April, 1909. It must be noted that his term of office expired on the second Monday of the previous January, and that he was not an officer, at all, on the 6th of April, 1909. In connection with the foregoing facts, *it must also be noted that the execution* on which he made the sale was issued by the clerk on the 8th of March, 1909, nearly two months after he ceased to be sheriff, and when he was no officer, at all. *It must be noted, also, that the Bank of Nez Perce* claims that Harry Lydon had a right to sell the property on the execution issued on March 8th, 1909, merely as an ex-sheriff, and not otherwise.

This claim of the Bank of Nez Perce that Harry Lydon, as ex-sheriff, *had authority to sell the property on the execution issued after he ceased to be an officer* is based upon the following statute :

Section 2047, Revised Codes of Idaho.

That statute is as follows, to-wit :

“Notwithstanding the election and qualification of a new sheriff, the former sheriff must return all process and orders before and after judgment, and must complete execution of all final process which he has begun to execute previous to the expiration of his term of office.”

Now, it is impossible for Mr. Lydon to have commenced the “execution” of an execution, issued on a judgment, recovered on the 15th of February, 1909 when his term of office expired on the second Monday of the previous January. To contend that he did commence the execution of such a process before the second Monday of January, 1909, *is absurd, indeed*. Yet, that is precisely what the Bank of Nez Perce does contend.

And, to support its contention, it cites some cases where it has been held that, when an ex-sheriff has attached property previous to the expiration of his term of office, he can, as an ex-sheriff continue to hold the property under attachment and that, as long

as he is thus executing the writ of attachment by holding the attached property to be sold on execution, he is executing authority vested in him by a statute like section 2047, *supra*. One case, cited by the bank to Referee held that the ex-sheriff *had a right to thus hold the attached property until his fees were paid*.

The bankrupt's estate can safely concede that all this authority cited by the Bank of Nez Perce give correct rules of law; *for the right of an ex-sheriff, thus holding property on a writ of attachment, to sell that property on execution, issued after he ceased to be an officer, is, in such cases, neither discussed nor decided*; consequently, none of such cases are in point, at all.

We must search for cases which are exactly in point, and we can find them, easily. An ex-sheriff, thus holding attached property, can not sell it on execution when the writ of execution has been issued after his term of office expired; and he has no more authority to make the execution sale than any other private individual.

Fletcher vs. Morrel, (Mich.), 44, N. W. 133;

Kent vs. Roberts, 14 Fed. Cas. No. 7, 713, 2 Story, 591;

35 Cyc. 1543-1544-1545.

The sheriff who has attached property can not retain it for purpose of sale under final process. 35

Cyc. 1544. The ex-sheriff cannot undertake new business. 35 Cyc. 1545. He has no more authority to execute writs issued after his term of office has expired and he has become an ex-sheriff than any other private individual. 35 Cyc. 1545, and note 27.

A writ of attachment is not a final process issued after judgment, but is merely a process by which property is held, and creates a lien on the property attached, and specially segregates it for sale on final process, issued after judgment; it must be sold on execution after judgment.

Subdivision 2, section 4315, Revised Codes of Idaho.

The court may order the attached property sold before judgment, and consequently before execution.

Section 4312, Revised Codes of Idaho.

But, where it remains unsold until after judgment, it must be sold on an execution issued on the judgment (subdivision 2 of section 4315, *supra*), and the judgment against the Pindels was recovered on the 15th of February, 1919, nearly two month after Mr. Lydon's term of office expired, which facts are found by the Referee, and not otherwise found by the District Court.

Thus, the authority forces the court to the conclusion that the execution sale made by Harry Lydon on the 6th of April, is absolutely void as concluded

by the Referee. Since this execution sale is absolutely void, the bank can not justify under it, but must account for the actual value of the property less the amounts it got from private sale, from sale on attachment, and from this sale on execution. *This is a sufficient reason to uphold the Referee's order, disallowing the judgment of the bank of Nez Perce, even if all the rules of law hereinbefore contended for are not accepted by the court.*

But we must not be confused and mixed by the many rules of law, applicable to the defenses of the estate against the allowance of the bank's judgment as a claim against the estate.

For; First: To recover the \$4333.50, as hereinbefore explained, for the first and wrongful attachment, it is not necessary to find that the execution sale is void; for it can be valid, and the difference between what the property sold for on execution and its value when wrongfully attached is the measure of recovery, and a subsequent valid attachment can not deprive the estate of the right to recover the \$4333.50, or its right to set-off enough of it against bank's judgment to wipe out that judgment, and, to recover under this rule of law, the bankrupt's estate did not have to prove waste or destruction of property.

Second: To have the \$4333.50 applied on the judgment in satisfaction and payment of it, the estate is not required to prove that the first attachment is void or that the execution sale is void, but both may be assumed to be valid as well as the second attachment, and all that the estate must prove, therefore, is that the property was wasted, destroyed, and injured, by the negligence of the sheriff and his keepers.

Third: To recover the \$4333.50, or to have it set-off against the judgment of the Bank of Nez Perce, the first attachment, the second and the execution sale may be assumed to be valid, and, therefore, all that the estate would have to prove is that the property was wasted, destroyed and injured by the negligence of the sheriff and his keepers.

Fourth: To recover the \$4333.50, or to have it set off against the judgment of the bank, it may be assumed that the attachments were valid, and all that the bankrupt's estate would have to prove was that the execution sale was void.

So the bankrupt's estate has four contentions on any one of which it can succeed on the facts found by the Referee, and have the judgment wiped out and disallowed.

Under any one of the four contentions: When did the estate's right accrue? The question answers itself; for \$4333.50 is the difference between what the bank got for the property and what it was worth when attached, and that difference could not be ascertained until after the execution sale on the 6th of April, 1909.

The Referee saw and recognized that the estate's right did not accrue until after April 6th, 1909. For he says: "There being a void attachment and no return of the property to the defendant and a void sale under execution, there was a continuing damages and therefore the defendant's right of action did not fully accrue until after judgment and execution, and the defense could not have been set up in an answer or cross complaint."

The Referee here was giving his reason why, in his opinion, the bankrupt did not have to claim the defense of the estate in an answer or a cross-complaint in the original action, and why he could not. The reason *that the defense did not accrue until after execution sale is as complete and as perfect a reason as can be given by any one.*

Under any of the four contentions of the bankrupt's estate, last above stated, the estate's defense to the allowance of the bank's judgment against the

estate as a claim to be paid in due course of administration, *did not accrue until after the execution sale.*

Having now seen that there is no way to prevent the estate having relief on the merits, it follows that the claim of the Bank of Nez Perce must be disallowed, and the United States District Court reversed because of the technicality which has denied the estate relief on the merits.

We can now proceed to the consideration of the matter of confirmation of the sale and the failure of the United States District Court to affirm the order of the trustee, fixing the expenses of the trustee, his attorney's fee, his commissions and the Referee's own commissions up to the time of the hearing before the Referee. The bankrupt wished to pay the entire indebtedness of the estate in full and thereupon have the trustee discharged and the estate closed, and, therefore, if the District Court did not wish to affirm order of Referee as to costs and expenses he, himself, should have fixed the amount.

If bankrupt is able to thus make full payment, he has done better than any other bankrupt in the United States, and he, therefore, should not be so severely criticised by the District Court, but, in paying his estate's debts in full, he did not want to pay the judgment of the Bank of Nez Perce, *since neither he*

or his estate owed it after the execution sale on the 6th of April, 1909, and since the Bankruptcy Court has jurisdiction and power to so adjudicate in the proceeding at bar, nor does he want to pay exorbitant expenses of administration, nor does he think that the trustee has a right to wrongfully and unlawfully seize his wife's property and charge his estate exorbitant, or any, expenses in the perpetration of this tort and wrong.

In commenting, and deciding on the right of the bankrupt to have all liability of the estate determined for the purpose of his paying everything in full, the Referee says: "I would not pass on this account at the present time as the Referee has directed that the original receipts and vouchers be filed by the Trustee or his attorney but now after almost a year has expired this has not been done but the bankrupt has prayed for a settlement in the nature of a Composition under the bankruptcy act and I will do the best I can to adjust the whole matter."

The Bank of Nez Perce, the Trustee and the Trustee's attorney were participating in the hearing before the Referee on all the foregoing matters, and all of them petitioned for review of the Referee's order; evidence was introduced and received by the Referee on everything he adjudicated in his order; the par-

ties have had their day in court. And it seems to be wrong and erroneous for the United States District Court to return the matter to the Referee for further evidence and litigation as to the amount of the cost of administration up to the time of the hearing before the Referee.

The Referee estimated the total cost up to the time of finally closing the estate, and placed all liability of the estate at the total sum of \$631.56.

What other additional cost could there be than the mere expense of preparing the Trustee's final report to the Referee? Every liability of the estate would be paid in full, and who could complain. Though, if notice of this final settlement had to be given by the Referee, the bankrupt pledges himself to pay the cost. He agrees to pay all administration cost in addition to that found by the Referee if there is anything to be done in the future to close the estate in the way of making a final report and notice of hearing on the report. This additional administration cost could not be very great.

To establish the error of the District Court in leaving the question of the fee of the attorney for the Trustee, and the charges of the Trustee against the estate, and his commissions and the commissions of the Referee, for future litigation and contention, let

us assume that by future order the Referee fixes the amount of expenses of the Trustee at the same figures he did in the order reversed by the District Court, and finally the claim of the Bank of Nez Perce is allowed in the sum directed by the District Court, then only \$3926.19 will be required to pay everything in full, and the United States District Court requires \$5500.00 and interest thereon to be paid in redemption of the homestead from administration. Here then is an excess of \$1573.81 with the interest added, that the United States Court requires the bankrupt to pay to the Trustee. What is to be done with this excess? It should not be wasted in expensive litigation waged by the Bank of Nez Perce and the Trustee and the Trustee's attorney. The bankrupt is entitled to some consideration, and given a proper chance to protect his homestead from sale, when he desires to pay in full.

Again, suppose the Honorable United States Court of Appeals agree with the Referee that the claim of the Bank of Nez Perce should be disallowed, *then the United States District Court requires the bankrupt to pay to the Trustee a sum in excess of what the Referee holds the estate justly owes in the amount of over \$4868.44.*

The District Court, in considering the branch of the hearing relating to the expenses of administra-

tion, suggests the right of creditors of the estate to object to the Trustee's report and this suggestion indicates that the court overlooked the proposition of the bankrupt to pay the claims of the creditors in full. *If their claims are paid in full, it is self-evident that they have no interest, whatever, in the question of the costs and expenses of administration; the question would be exclusively between the bankrupt and his wife, on the one side, and the Trustee and his Attorney, on the other side.*

To give the bankrupt the right to pay all the liabilities of his estate, and he pays them, it is very apparent to any one that there is no necessity to take the estate through the ordinary proceedings of the Trustee making a report, the creditors having a chance to object to it, and no necessity for the Trustee paying prorata to the creditors on the order of the Referee. Has the Bankruptcy Court the jurisdiction and power to settle the estate as solvent?

If the Referee has the authority to order prorata distribution of an estate which is insolvent, he certainly has the authority, power and jurisdiction, to order full payment of all claims and expenses of the estate which, by increase in the value of its property, has become solvent, and, to be able to thus order full payment, he has the authority to ascertain the

total liability of the estate so as to give the Bankrupt or his wife a proper and just opportunity to pay to the Trustee every Dollar and every cent necessary to the Referee's order to the Trustee to pay everything in full; *so that thereby the estate will pay one hundred cents on every dollar of its indebtedness, and its liabilities.*

And, in order to pay everything in full, the Referee must determine what claims of the claims filed are owed by the estate; *to distribute an insolvent estate*, the Referee has to ascertain the total liabilities of the estate.

The estate of Frank M. Pindel has never been in a condition where the Referee could make a partial distribution among the creditors if the homestead had been sold long ago. For the claim of the Bank of Nez Perce had never been allowed until the decision of the District Court in the present proceedings. The granting of the order of sale, the finding that the homestead was worth \$9000.00 and should be sold, never allowed the claim of the Bank of Nez Perce. This is self-evident.

The claim of the Bank of Nez Perce has now been ordered allowed by the District Court in the sum of \$3294.53, and the other claims allowed against the estate amount to \$258.50. These two sums constitute the total amount of claims allowed against the es-

tate by the Referee and the District Court; and there are no other claims.

The total amount of claims, therefore, is exactly \$3553.03, and, deducting this from the \$5500.00 without computing the 7 per cent interest required to be paid, we have a difference of \$1946.17.

There is no use for the \$1946.17, and the seven per cent interest on the \$5500.00, except only payment of costs of administration. *If, therefore, the Trustee and his attorney, can push the costs and expenses of administration above \$1946.17, they certainly have consummate skill in the matter of making the settlement of a small estate swell unto the unreasonable.* There can be no just reason for requiring this large amount to be paid to Trustee when the Referee finds that total costs and expenses are only \$373.06 and the United States District Court does not find that they are, or can be, more than \$373.06.

Probably, the Court may say that if the homestead is worth Fourteen to Fifteen Thousand Dollars, it will be easy to borrow some \$6000.00 or more on it, and, as the surplus, over paying everything, will be returned to the bankrupt, or his wife, the fact that the District Court required him to pay to the Trustee \$5500.00 with interest thereon is not a prejudicial error. But it is much easier to borrow the smaller amount.

There is nothing to establish the rule of money loaners as to the amount which can be borrowed and the Referee has made no finding as to such a rule. Likely, therefore, it is safe to assume that the money loaners would not loan more than one-third of the value. At a value of Fifteen Thousand, on the one-third rule, Five Thousand Dollars can be borrowed, but at the value of Fourteen Thousand only \$4666.66 could be borrowed and at the value of \$10500.00 only \$3500.00 could be borrowed; consequently, it appears that the requirement to pay in more than can possibly be used to pay the liabilities, including costs of administration, and everything, within 35 days might result in the confirmation of the sale, and in giving Mr. Collins a profit of Four Thousand and Five Hundred to Five Thousand Dollars; for he could sell the homestead at private sale, and get its true value.

Consequently, more time should be given for paying in the required amount if the sale is to be confirmed. If the sale is not confirmed, a reasonable time should be given to the bankrupt or his wife to pay in the amount necessary to settle the estate as a solvent estate before a new sale is ordered. The bankrupt and his wife should be given a reasonable opportunity to settle the estate as solvent.

If the Bankruptcy Court is without jurisdiction to settle the estate as a solvent estate, then the bankruptcy adjudication and the discharge of the bankrupt should be set aside, and the Bankruptcy proceedings dismissed, and let the parties concerned fight it out in the state courts.

But, since the estate became, by increase in the value of the property, solvent subsequent to the Bankruptcy adjudication as found by the Referee, the Bankruptcy Court has jurisdiction to settle and close it as a solvent estate, and, therefore, the bankrupt and his wife now have the undoubted right to pay all liabilities in full, and the Bankruptcy Court has the undoubted jurisdiction to ascertain the amount of all liabilities and to receive that amount from the bankrupt or his wife, and settle and close the estate as solvent. It is not a startling proposition.

It may be a new question in bankruptcy; yet, it must be adjudicated in the light of justice to the bankrupt and his wife, and, since it conclusively appears that the estate is now solvent, that fact should be a great reason for disaffirming the sale to Mr. Collins. Especially is this so, since he is president of the Bank of Nez Perce and, since the bank pushed the sale of the homestead and did not push the mat-

ter of the allowance of its claim against the estate, and, since the bank's claim is, practically the claimed indebtedness of the estate.

Since the sale was subsequent to the year allowed for filing claims and, since the bank pushed the sale of the homestead and did not push the matter of the allowance of its claim, and, since the Trustee pushed the sale of the homestead and did not push the objections to the allowance of the claim of the bank, and did not require the matter, as to the allowance of the claim of the bank, to be adjudicated before sale of the homestead, and, since the homestead is worth so much more than the \$10,500.00, and, since the creditors had no notice, and Mrs. Pindel had no notice, and the order of sale was ex-parte, and notice and order of sale differ, *there should be no hesitation in disaffirming the sale*, especially, since the bankrupt and his wife now ask that the total liability be ascertained so that they can pay it to the Trustee and thereupon have the estate closed as solvent and not as insolvent.

Neither the bankrupt nor his wife should be required to pay unjust debts nor unjust expenses, or expenses made by the Trustee in committing torts

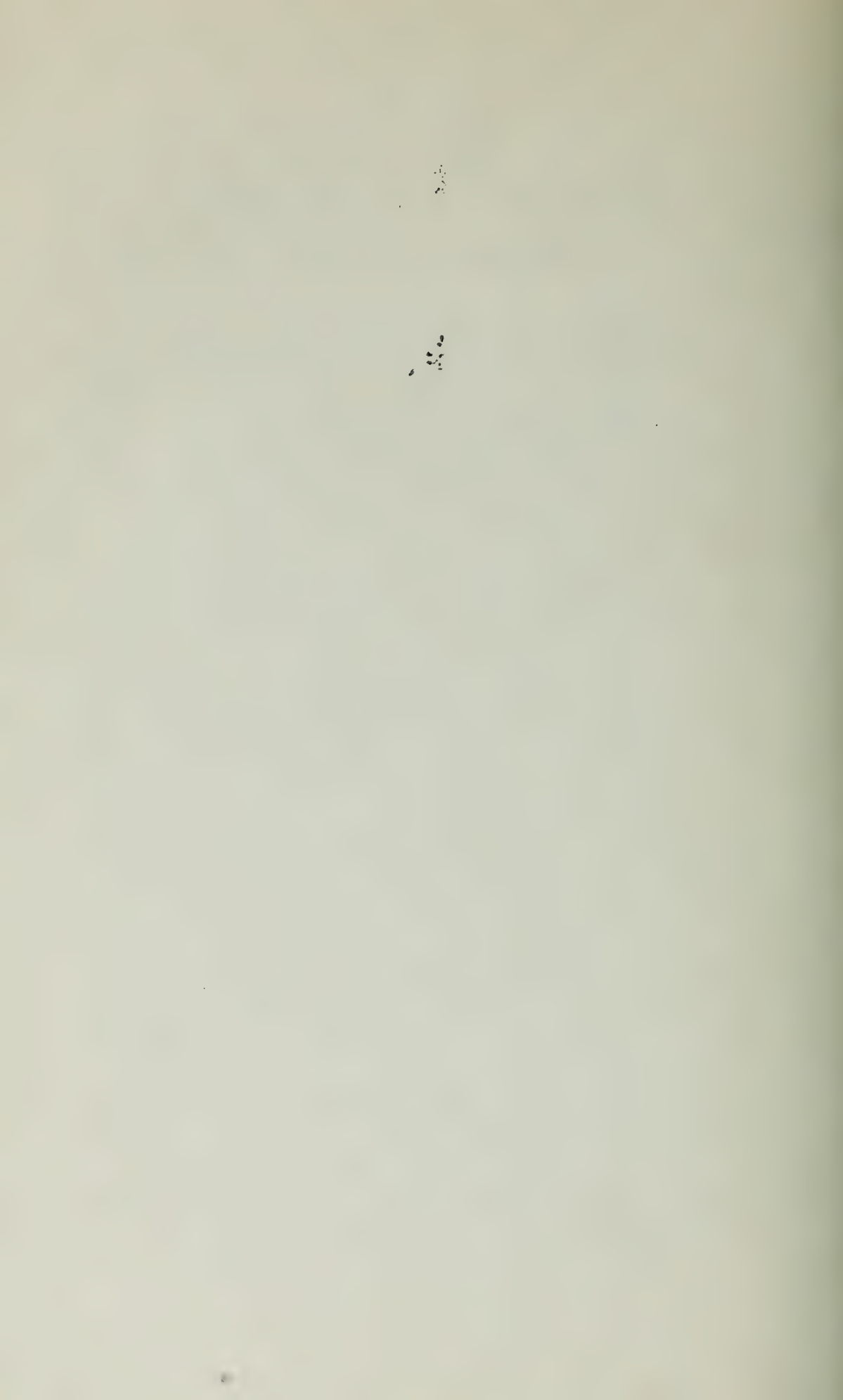
under direction of the attorney for the Bank of Nez
Perce.

Respectfully submitted,

.....*Edwin H. Williams*.....

.....*Ben F. Tweedy*.....

Attorneys for Bankrupt.



IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK M. PINDEL,
Petitioner,

vs.

NORMAN J. HOLGATE, as Trustee in
Bankruptcy of the Estate of FRANK
M. PINDEL, Bankrupt, and BANK
OF NEZPERCE,
Respondent.

IN THE MATTER OF FRANK M. PINDEL,
BANKRUPT.

BRIEF OF RESPONDENTS.

On Petition for Revision in Matters of Law of Orders
of the United States District Court for the
District of Idaho, Central Division.

IN BANKRUPTCY.

FINIS BENTLEY,
of Lewiston, Idaho.
Attorney for Norman J. Holgate,
Trustee, and

EUGENE O'NEILL
of Lewiston, Idaho,
Attorney for Bank of Nezperce Claimant.

OCT 23 1914

F. D. Monckton,
Clerk.

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BRIEF OF RESPONDENTS NORMAN J. HOL-
GATE, TRUSTEE, and BANK OF NEZ-
PERCE, CLAIMANT.

*Finis Bentley, attorney for the Trustee, Norman J.
Holgate, and Eugene O'Neill, attorney for Bank
of Nezperce, Claimant.*

This matter has been before this court prior hereto
under the name of "Bank of Nezperce, et al., vs.
Pindel, et ux. In re Pindel" and is reported in 193rd
Federal Reporter at page 917 and following.

STATEMENT OF FACTS.

Frank M. Pindel was declared a bankrupt on February 14, 1910. The Trustee, Norman J. Holgate, was appointed as such October 7, 1910. In the case reported in 193rd Fed. Rep., at 917, the wife of the bankrupt, Sarah E. Pindel, was party. A large amount of testimony was taken, involving all the possible issues that could come up in the case. The matter was presented to the District Judge, and decision rendered on the 20th day of May, 1911. These facts appear in the aforesaid cause in this court. In that case the question of the ownership, and whether exempt or not from sale for Bankrupt's debts, was brought for determination on review by this court, as to certain personal property and as to the real estate, consisting of lots numbered 1, 2, 3, and 4 of section 34, and lots numbered 29, 30, 31 and 32 of section 27, in township 34 north of range one west of Boise Meridian, then in Nez Perce, now in Lewis county, Idaho, containing 160 acres. (Page 919 of said decision). In the examination of that case before the referee, a large amount of evidence was taken covering all questions involved in this case, though not specifically plead. The amount paid by the trustee for taking the testimony therein can be determined by

taking the charges for one-half thereof, shown in lines 6 and 11 of page 79, Transcript in this case.

In the case reported in 193rd Fed. Rep. 917, in opposition to the claim of the Bankrupt and his wife, that the land was worth only \$5000 and if worth more than \$5000 it had been segregated by a competent court—one piece of the value of \$5000 and the balance some \$1500. It was determined that the decision of the District Court must be sustained finding that the value of the real estate was \$9000, that it had not been segregated by any state court, and that Bankrupt and his wife should have thirty (30) days in which to pay the sum of \$4000 to the Trustee and thereby secure to themselves the land involved in the homestead, the same discharged entirely from further liability to creditors. In the event of the \$4000 not being paid (see page 920 of said Decision) “the Trustee is authorized to take the necessary steps and sell, in the manner provided by law, and under the direction of the referee in bankruptcy, the entire tract, for not less, however, than the sum of \$5000, and that out of the proceeds of such sale the Trustee pay to the Bankrupt and to his wife, Sarah E. Pindel, the sum of \$5000 and account for the balance, if any, of such proceeds as a part of the assets of the estate to be distributed in due course of administra-

tion. This decision was rendered by this Honorable Court February 13, 1912.

After waiting a further thirty days, giving the bankrupt and his wife full opportunity after the closing of the litigation to pay the \$4000, the Trustee sought to obtain from the Referee an order of sale of said real estate, and after seeking for the period of some six months, obtained such order on March 1st, 1913, (Transcript of Record p. 71). The order recited notice to creditors of at least ten days given of the sale of the land described in the petition. That at a meeting of the creditors so called a "majority of the creditors and a majority in the amount of claims represented voted to sell the said land" (Transcript of Record p. 69). Petition for order of sale of real estate set out (Transcript of Record p. 81). Sale of said real estate was made under said order April 5, 1913, at Nezperce, the County Seat of Lewis County, in front of the place where the District Court was in session, or had last been in session, in said county, (Transcript of Record p. 83). The land was sold on April 5th, 1913, after due notice published and posted, for the sum of \$10,500, to Orville M. Collins, he being the highest and best bidder; and he then paid on said purchase price the sum of \$1050 of the purchase price, pursuant to the terms of the sale

announced in the notice. (Transcript of Record p. 83 and 84). Return of sale was immediately prepared and in the absence of the Referee from the District, was not filed until immediately after his return on April 23, 1913. The return of said sale is found in the Transcript of Record pages 73 to 85 inclusive, setting forth a full statement of the Trustee's proceedings and including an account of costs and expenses involved in the Trustee's handling of said estate to that time. The return shows that said sale was legally made and fairly conducted. So found by the Hon. District Court (Transcript of Record line 12 p. 48). The Trustee asked, in said Return that the sale be confirmed and that his expenses aforesaid, incurred in determining the right to sell the land, including the costs in the Circuit Court of Appeals on Review, be settled in this proceeding. In the previous case in this court as reported in 193rd Fed. Rep., p. 917, costs were allowed in favor of the respondent and cross-petitioner, Norman J. Holgate, as Trustee of the Estate of Frank M. Pindel, and against the petitioners and cross-respondents, Frank M. Pindel and Sarah E. Pindel, his wife 193 Fed. 924, which costs were taxed in the sum of \$285.70 (Transcript of Record p. 80.)

To this return the bankrupt caused to be filed objections upon information, setting forth that the purchaser had not paid in the money, ten per cent of the purchase price, and particularly urging that there might be a paying out by the bankrupt thus saving a sale of the real estate; also containing a general attack on the Trustee for taking possession of the property, censuring the Trustee's activity for wanting to get something accomplished for the estate, and objecting to the items of the account presented for the consideration of the Court. He also claimed there was nothing due the Creditor, Bank of Nezperce, and claimed damages for the taking of the property of Sarah E. Pindel. He also asked that the objections to the claim of Bank of Nezperce be heard at the same time with the question of confirmation of sale. These objections and request for hearing together were not noticed, not even mentioned until the time of hearing. This hearing was brought on the insistence of the Trustee that a hearing should be speedily had. Answers were then prepared, filed and served, both by the Trustee and Bank of Nezperce. The answer of the Trustee denied the wrongful taking of personal property, by him of Sarah E. Pindel at the time of qualifying, October 7, 1910, alleging that at the time he asked the Bankrupt

what exemptions he claimed, and was informed none were claimed, and alleging that exemptions were set apart by the Trustee to the Bankrupt at that time, and alleged the amending thereafter (in December, 1910) of the Bankrupt's schedule as to exempt property; alleged the intervening in the case of Sarah E. Pindel and the decision of the Hon. District Judge. He alleged the filing of petition for review of that decision in the Circuit Court of Appeals, and that during said litigation the Trustee had actual possession of the personal property; that he was obliged to employ a keeper to maintain possession of the property and protect the interests of the Creditors, and alleged that the Bankrupt had been, during the years 1911 and 1912, in possession of the real estate, describing it as above. He alleged the Bankrupt had the crops of 1911 and 1912 and all the proceeds thereof; that he had made no accounting of said proceeds, either to the Trustee or to the Referee, and that Bankrupt had not paid over to the Trustee *anything whatever* for the use of the real estate; that he had made no accounting whatever to the Trustee for the proceeds of the real estate, and that he refused, *upon demand, to make any accounting of or to surrender possession* of the real estate, and that he was *entering into an extended litigation for the sole pur-*

pose of maintaining possession of the said real estate and obtaining the crops then growing thereon for the year 1913. And the Trustee petitioned the Referee, the Hon. District Court aforesaid, that an order be made immediately confirming the sale of the said real estate and placing the purchaser thereof in possession, and in event that the said confirmation is denied or delayed that the said Bankrupt, Frank M. Pindel, be required to surrender possession of the said real estate to the said Trustee and to account for the proceeds of the said real estate for the years 1911 and 1912, and to pay to the said Trustee the proceeds thereof, less a reasonable sum for the care and labor expended by the Bankrupt in caring for and handling crops and caring for the real estate. The claimant Bank of Nezperce also filed a reply to the answer of the Bankrupt to the claim of Bank of Nezperce. In its reply, Bank of Nezperce admitted obtaining a judgment on February 15, 1909, against both Frank M. and Sarah E. Pindel, based upon the verdict of a jury in the District Court of the Second Judicial District of the State of Idaho, in and for Nez Perce County, the judgment being for the sum of \$3635.16 and \$1747.12 costs, which included keeper's fees and harvesting and hauling expenses and from which no

appeal was ever taken, it admitting the attachment of the defendant's property, the dissolution of the first attachment and the property being at once re-attached and held until after judgment. That upon the execution issued thereon all the property was sold except the real estate. Denied all injury to Sarah E. Pindel and the Bankrupt, or that they were in any way injured or damaged by any levy or detention of any property, or any use or services of any attached property; denied all damage to growing crops, or that they were not harvested at the proper time. Denied that by reason of any neglect or carelessness of plaintiff in said action or of the sheriff, or any wrongful or unlawful attachment whatever, or seizure, the Creditor damaged the Bankrupt or his wife in any sum whatever. Denied that the property, when attached or seized, was of the value of \$5000, or any other greater value than what it brought on execution sale thereafter, viz., \$2030.39 less the costs of the execution sale, \$124.14, and the costs in the suit, \$1747.12, including keeper's fees, harvesting and grain hauling expenses; and denied that by any seizure, or detention, or neglect in the care or keeping of the property, in the cutting or harvesting of the crops at the proper time, the said Bank depreciated the value of the property; and denied that the use

or depreciation of the same was the sum of \$3000 or any other sum whatever;

Claimant Bank of Nezperce alleged that at no time in the said District Court did the defendant set up any counter claim or cross-complaint, or claimed any damages in said litigation. Denied that the Bank pretended to but averred that it actually sold the attached personal property on execution duly issued out of the court on the judgment of said District Court, and that it was all regularly sold after due notice and that the defendant's wife, Sarah E. Pindel, was present and took part in the bidding in the sale of the property; denied that, at the sale of the property, it was purchased by an officer of the Bank or that nothing hardly whatever was paid for the same; denied that the trustee, at the instance or request of the Bank of Nezperce, took possession of the individual or separate property of Sarah E. Pindel, or held possession of the same for a period of nine months, or deprived the said Sarah E. Pindel of the use of said property at a damage of \$200 or to her damage in any sum whatever. Denied that there was due to Bankrupt or said Sarah E. Pindel from the Bank the sum of \$5200, or any other sum whatever. Denied that any sum should be set off against said creditor's, Bank of Nezperce's judgment secur-

ed against them in said District Court, and denied that evidently or at all Judge Dietrich made, rendered or entered the order requiring \$4000 to be paid in cash under the mistaken idea that the allowed claims against the estate amounted to \$4000 or more, and asked that a speedy decision as to the amount due on its claim be made and the estate now pending unsettled for so long a time be closed and the Creditors receive the money so long theirs and unpaid. The paper to which this answer was filed with the Referee was not served until the time of the hearing, which commenced on the afternoon of June 14, 1913.

The papers constituting these issues have not been brought up by the Bankrupt for the consideration of this Court, and are therefore not referred to as contained in the Transcript.

This hearing was proceeded with. All manner of evidence was introduced, making a record of 654 typewritten pages, and taken directly into a typewriter by one D. E. Wolgemott,. The Bankrupt refused to have the testimony taken by a competent stenographer, and the cause was proceeded with for more than twenty days, with certain necessary interruptions, confirming at once the allegations in the Trustee's said answer that the Bankrupt was entering into an *extended litigation* for the *sole purpose*

of *retaining possession* of the real estate and *obtaining the crop* then growing thereon, *for the year 1913*. Moreover, the typewriter, said Wolgemott, in his dealing in the matter, is shown forth in the decision of the District Judge at pages 86, 87 and 88 of the Transcript of Record. Out of this vast amount of material, so brought into the record, the petitioner for review has brought up only about ten pages of printed matter, some 9½ pages of typewritten matter, further *confirming* the said statement of the Trustee in his answer to objections of confirmation of sale. After the preparation of briefs the case was submitted to the Referee and, after long delay, the Trustee and Claimant, Bank of Nez Perce requested the District Judge to take action in the matter, obtaining a communication from His Honor, Judge Dietrich, directing that the Referee show cause why he should not render a decision in that matter within a limited time stated.

A decision was rendered by the referee a year and a week after the sale of the real estate (see Transcript of Record, pages 19-35, inc.), and from this decision by the Referee both the Trustee, Norman J. Holgate, and the Claimant Bank of Nezperce, petitioned for a review by the said judge of this Court,

which review was granted. (Transcript of Record, pages 17 and 18).

Thereafter the cause was brought on regularly for hearing before the District Judge, Hon. Frank S. Dietrich, and decision in review rendered in the cause. The said judge had before him the entire record as the same was filed with the Referee, including petition for order directing Trustee to sell property, (Transcript of Record, pages 81 and 82); order of sale, (Transcript of Record pages 69, 70); affidavit as to order of sale by Norman J. Holgate, (Transcript of Record, pages 70, 71, 72); return of sale of real estate, (Transcript of Record pages 73-81); and notice of sale, (Transcript of Record pages 83 and 84); and statement of the publication in the Nez Perce Herald of notice of sale; (Transcript of Record, page 85).

A hearing was held in the District Court, after due notice given, Ben F. Tweedy, Esq., appearing for the Bankrupt, Finis Bentley, Esq., appearing for the Trustee, and Eugene O'Neill, Esq., appearing for the Claimant Bank of Nezperce; and thereafter the Court rendered its decision in said cause, and filed its opinion upon the various matters involved in said hearing, (Transcript of Record, pp. 35-53, inc.), in which the Honorable District Court rendered a de-

cision reversing the decision of the Referee with reference to the claim of Bank of Nezperce, allowing the same; with reference to confirmation of sale confirming the sale; with reference to the order confirming sale of real estate, granting to the Bankrupt and his wife Sarah E. Pindel the privilege of paying in, within 35 days from the date of decision, \$5500.00 with interest thereon at the rate of 7 per cent per annum, from April 5, 1913 (the date of the sale) until paid, and thereby securing, on the payment of the said sum to the Trustee in Bankruptcy of said Estate, the right to the Bankrupt and wife to retain the land in question in this case, free from further claims of the Trustee, and to be the homestead of the Bankrupt and his wife, to-wit: Lots numbered one (1), two (2), three (3) and four (4), in section 34, and lots 29, 30, 31 and 32 in Section 27, Township 34 north of range one, west of Boise meridian—One hundred and sixty (160) acres now in Lewis County, State of Idaho. (Transcript of Record, pages 51, 52, inc.). Said decision was filed and dated June 3, 1914.

Thereafter the Bankrupt by his counsel gave notice of application for review to this the Circuit Court of Appeals, Ninth Circuit of the United States, at San Francisco, California, of the decision of the Honorable District Court, and has filed his

petition for revision and transcript of record, together with additional transcript of record in the cause, and his brief to which answer is now being made.

NOW REPLYING TO THAT BRIEF.

The facts set up therein are not conceded to be a true statement of the facts in this case. For that reason the respondents, the Trustee and Bank of Nezperce, combine in their answer to the Petitioner's brief and make the foregoing statement. They do not agree with the statement of facts as set forth in the brief of respondents; and further state, with reference to the facts in this case, that no evidence whatever was introduced, or any facts whatever shown in the course of the proceedings that indicated any wrongful acts on the part of the Trustee, or on the part of the Creditor, Bank of Nezperce; or any evidence showing any offset or counter-claim to the claim of Bank of Nezperce. Said claim is founded upon a judgment obtained on February 15, 1909, in the District Court of the Second Judicial District of Idaho, in and for Nez Perce County, for the sum of \$3635.16 judgment, and \$1747.12 costs, including keeper's fees, harvesting and hauling expenses, and on which there was paid only the sum of \$1956.25,

and \$131.50, precisely as shown by the decision of the Honorable Judge of the United States District Court, (Transcript of Record p. 36). The decision of the Referee in this case was anticipated by the respondents. The court was asked by the respondents, particularly the Claimant, Bank of Nezperce, that the case be taken away from him on account of his attitude as shown during and at the close of the hearing of the evidence in the cause, at Ilo, Idaho, and it was upon this application that the court directed that he should show cause why he should not render a decision therein; and the opinion of the Referee, as set forth in the Transcript of Record shows his attitude in this case and confirms the opinion of the respondents as to his attitude toward the Trustee and toward the Claimant, and speaks for itself as to why the Trustee and the Claimant, Bank of Nezperce, asked that the case be taken from him and why they have both applied for review of that decision.

Now in reply to aspersions and personal statements in Petitioner's brief, the respondents Trustee in Bankruptcy, and Claimant, Bank of Nezperce make a

GENERAL REPLY TO STATEMENTS.

The Trustee has been such Trustee of the estate of the Bankrupt since his appointment, qualifying immediately on receiving appointment, and has continued to be diligent and careful with reference to all interests intrusted to him, and has spared no trouble or expense in preserving the property, as is shown by his return of sale (Transcript of Record, pages 77-80, inc.). He has been put to much expense, has been obliged to pay out large sums of money and to even hunt up stock that has been taken from the possession of his keeper, to-wit, hogs under his charge, and for the keeping of which, on his bond, he was responsible. The bankrupt selling the same and without notice to the Trustee causing expense in looking up the property. (Transcript of Record line 15 p. 78). He is now, for the second time, defending an action in the Circuit Court of Appeals, in each instance being obliged to have counsel, first in District Court, and then in this court in following out litigation. Transcripts of the records have been taken, for which he has been obliged to pay; in the previous case (Transcript of Record lines 6 and 12, page 79) stenographer's fees in the sum of \$88.45, besides fees of witnesses, as shown in Transcript of Record, pages 78 and 79; and in costs in the previous

case in this court, a sum of \$285.70 allowed him on February 15, 1912, (Transcript of Record p. 80) ; and in this part of the case Bank of Nezperce had to pay the sum of \$145.00, one-half for the taking and type-writing of the evidence before the Referee at Ilo, Idaho, between June 14th and August 8, 1913, (Transcript of Record pages 86-88). All facts moreover necessary for the Referee to decide on the claim of Bank of Nezperce were taken and paid for in the taking of the testimony before the Referee at that time, December 30, 1910, and February 24, 1911, costing the Trustee said \$88.45 (Transcript of Record lines 6 and 12 p. 79).

The claim of Bank of Nezperce, the other respondent, herein, rests upon said judgment obtained on the 15th day of February, 1909. In that case the action was commenced on June 27th, 1908, and an attachment was issued which was dissolved on or about August 13, 1908, but the property then held was immediately re-attached, held and sold on execution, except that part for which \$131.50 was mentioned, was sold under an order directing the sale of attached property, and the balance on or about April 6. 1909, upon execution sale, by the ex-sheriff, who had *attached the property during his term of office and held the same up to that time.* In his return he in-

cluded some \$57 for hogs sold by Sarah E. Pendel after the attachment, and the money paid to the sheriff. The balance constitutes the claim of Bank of Nezperce which the Bankrupt scheduled in his petition for bankruptcy at the sum of \$3427.93 the claim filed being for the sum of \$3912.14 and now allowed by the court in the sum of \$3426.03;) Transcript of Record, pages 36 and 37). This claim was recognized by the Bankrupt and his wife in the previous proceedings before this court as a valid and existing claim against the Bankrupt's estate and the hearing in that case proceeded on that basis, (Vol. 193 Fed. Rep., 917 and following), and upon this claim nothing whatever has been paid. Moreover, not one cent has ever been paid to the Trustee by the Bankrupt in this case, all the large expenses involved in the extended litigation having been met by the Trustee aided by Creditors—not one cent paid by the Bankrupt who, however, has been in possession of the lands which he inventoried as the real estate of his estate, holding them as though exempt during the entire period. He has made no returns whatever and retained all the income which, according to the statement contained in the Referee's decision, as to the value of the crop for 1908 would amount to a *very large* sum during the five seasons that he has re-

tained such possession, staving off the day of settlement by litigations either by himself and wife or by himself. And the debt for claim thus resisted is a joint debt of both the Bankrupt and of the said Sarah E. Pindel. (Additional Transcript of Record, middle of page 5). So it appears that all this litigation by Sarah E. Pindel and by the Bankrupt was a litigation prosecuted solely for the purpose of avoiding a payment for which both were liable. It shows the bad faith of both the Bankrupt and his wife, in the entire proceedings in this suit and in all the bankruptcy proceedings.

REVIEW OF PETITIONER'S BRIEF.

It is due to the Court from Respondents, to give it such aid as it can in understanding the true situation in the case, and in so doing it becomes necessary, as briefly as possible, to call attention to certain things stated in Petitioner's brief. These might be misleading if attention were not called to them. We will endeavor, in criticising this brief, to go as directly as possible to the points involved without seeking to examine them in the sometimes apparently duplicated statements.

Page 2, line 6, the value of the land was found to be \$9,000 by the Honorable

Judge in his decision of May 20, 1910. There is nothing to show that the value of the land was ever less than that, from date of adjudication of bankruptcy, February 14, 1910, and it is immaterial what its value was at any of these times, excepting the 5th of April, 1913, when it sold for \$10,500 at a sale regularly made and where competition for the property was free and open. Bank of Nezperce would have a right to question the condition of the Bankrupt's estate at the first meeting of creditors. It would be presumed that it did, with a claim of the size it later filed. The statement contained in lines 13, 14 and 15, page 4 of Brief, should be compared with the statement of the Bankrupt at the time of filing his petition, that he owed \$3427.93 (Trans. of Record line 30 p. 36) and if the position of the Bankrupt as set forth following those lines on that page 4 of brief, it is true, then his whole purpose in becoming a bankrupt was to wrong and defraud Bank of Nez Perce, when, in his petition he says that he honestly owed the Bank the sum mentioned last above. The consistency of these statements is questioned if the truthfulness of the Bankrupt is not challenged thereby. The Referee—and we say here that it is not for the purpose of criticising the referee but for the purpose of show-

ing, as indicated, commencing line 5, page 5, and in the statement at lines 9 and 10 of page 6 of brief referred to as samples — the Referee seems to have completely fallen into the line of thought indicated by the counsel on the other side of the case; and this is stated with all deference to the Court and all departments thereof, believing that the safety of the country in all its best relations and interests of its people rests upon the respect entertained for our courts. It appears that at line 5, page 5 of brief, the Referee is forgetting for the moment at least his solemnly signed statement in the order for sale of the real estate, in which he plainly says (commencing at line 10 of page 69 Transcript of Record) that notice of at least ten days had been given to creditors, of the sale of the land, and the creditors voted to sell the land. No record or showing to the contrary was introduced. But he said nothing else with reference to that matter, and nothing is shown that any parties to the litigation were acting against the Bankrupt. The record itself shows, in its entirety, that the Bankrupt had been, at the time of the hearing at Ilo, Idaho, more than four years litigating creditors and the Trustee and paying nothing toward

the settlement of the estate. The aspersions against the attorney for the claimant, and the reappearance of these aspersions through the decision of the Referee and argument of Bankrupt's counsel suggests that the Petitioner's counsel regards this as somewhat of a criminal case and in defending his client it is necessary to abuse others in detracting attention from his own client. There is nothing in the Record, as shown at line 19 and following (p. 13 of brief), and lines 10 and following (p. 31 of petitioner's brief) indicating that counsel for claimant had anything to do with the seizing of personal property. The record shows that Finis Bentley, Esq., has been the attorney for the Trustee in these proceedings. At line 10, page 14, said brief, the attorney certainly cannot have referred to the Record (Trans. of Rec., page 81, 82) where nothing appears but the signature of the Trustee himself, and he has certainly shown in this continued contest that he is a man of some individuality and energy of his own. So all other statements with reference to counsel for claimant, are unfounded. Line 11 and following of page 7 of Brief must certainly be a misprint, for the sheriff had no business to, and never did find the value of the attached property except in selling it; and at lines 3 and 4, page 8, as well

as in lines 15, page 14, to line 12, inc., of page 15 of Brief, are set forth statements with which the Referee had nothing whatever to do, and, as shown in the affirmative part of our brief, it is irrelevant, immaterial and incompetent to be taken into consideration by the Referee.

Nothing in the Record shows that the Bank of Nezperce has gone out of business; and if it has, and we concede that it has and that Mr. Collins is back of it, he is back of it for the usual purposes involved in the honest closing of banks—to pay in full the depositors, and should receive unquestionable moneys loaned to patrons of the bank for use for business purposes. And had the Pindels had more honesty and less rascality the disgraceful statements, all made by his own counsel of his being in and pardoned out of the Idaho Penitentiary, would not appear so frequently in this record.

The record before the lower court, which the Bankrupt has not seen fit to bring up shows that this money, borrowed of the Bank, was invested in cattle, and the money was received from the Bank until it attained the large sum of \$2950, before a note was asked for; and that when Mrs. Pindel sold the cattle she received \$3831 for them, some of which, at least were purchased with this \$2950, and that she paid

not one cent upon the Bank's claim, claiming that that amount would not more than pay her for her individual interest in the stock. At the same time, the judgment against her, based upon her own and the Bankrupt's said note, is a joint judgment against both of them, and all her litigation in this court in this portion of the case and that indicated at page 917 of 193rd Federal Reporter, was an effort to save herself from paying her own debt owed by her jointly with the Bankrupt to Bank of Nezperce and on which its claim is founded. These facts were all before the Referee and the same briefs were before him that were submitted to the Honorable District Judge, and the Referee must have been oblivious of the facts and the law or else in some way unduly influenced by the Bankrupt or Bankrupt's counsel, or some of these points would have been recognized by him in rendering his decision.

THE FACTS AND THE LAW IN PETITIONER'S BRIEF.

The statements in the brief (pages 29-39) by Bankrupt's counsel need only passing notice to show their lack of foundation. In speaking of a conversation with Mr. Dowd (page 29), and of a conversation with Mr. Collins (page 31, line 6) and also in speaking

of the letter of the Honorable District Judge (Petitioner's brief, p. 30) the Bankrupt's counsel seeks to put special interpretations upon all those matters; but the one thing necessary to show, before the Bankrupt is entitled to any consideration in these matters, is lacking, to-wit: any statement that he at any time, or under any circumstances, has ever paid one cent towards the satisfaction of the claim of Bank of Nezperce. He doesn't approach either Mr. Dowd or Mr. Collins with the money and say "I am ready to pay that judgment or that debt," then on paying for it might ask to have the property back. The fact of the matter is, the Creditor has a right to execution. He has a right to press his claim for debt until he receives his money. The debtor has no right to complain of his insistence or energy; that is a right that is given by law, and the talk about being ready to pay, and about what people have done with his property, under valid process out of a court, is a waste of time on the part of the talker and is not deserving of attention at the hands of the listener. Until such payment of the claim is made, the Court is right in holding and assuming that there is an obligation to pay still existing. The holding-off of allowance of the claim of Bank of Nez Perce is a mere matter of negligence on the part of the Referee, with all due

deference to His Honor; and had the evidence before him gone up, it would appear that almost every claim but about three against the estate, with one exception—a claim disallowed, was allowed by him after June 14, 1913. Should this court desire evidence of these things, it will be furnished by further transcriptions from the evidence.

The Referee had no Authority to find with reference to the value of the property attached. As these respondents will show in their own part of this brief, all matters occurring prior to judgment must be brought in as cross-complaint or counter claim in that case; and nothing except the sale of the property—held that long period of time by Sarah E. Pindel resisting a sale under attachment and asking that the sale be made in the spring, is up for consideration, except the validity of the sale made by the sheriff who attached the property.

The assignment of errors (page 40 of the brief) simply indicates that a proper view of the facts and the law applicable to this case has not been presented to the Court. The statutes of the State of Idaho (set forth at pages 45, et seq.) are for the most part but not entirely correct in their setting forth. The comment upon the statutes is as to theory and, as to the application of those statutes, far-fetched and

misleading and the authorities are not in point. We will speak of a few of the authorities, and by omitting the others we are not conceding that they have any application to this case, but are not criticised because they have no application whatever to this case and for lack of time and space for discussing them.

Under the first point the point is immaterial in this case for the reason that the statements are bald generalities of statement. Bankrupt surrendered his property to the Trustee on becoming a bankrupt and thereby lost title to it and right of possession in law and should have long ago lost it in fact. The Trustee holds the title and right of possession and is to handle it for the benefit of the Creditors of the estate, and the Bankrupt must aid him with his knowledge on the lines indicated in the Statute, Bankruptcy Act. He is to receive his discharge from his debts, a valuable consideration, and in return is to aid the Trustee, not to put Bankrupt in a position to fight the Trustee and creditors, but to make the estate as valuable as possible for paying the claims of creditors. Bankrupt's counsel's theories on this line are wrong, and the acts of Bankrupt have throughout been worse than his counsel's theories. The Bankrupt has no set-off in this case, as we will

show in respondent's discussion of the law and facts of this case and the cases cited under this first head have no application to the points involved in this litigation.

The statements of Petitioner's counsel under "authority, under point 1," page 51, has no application to this case. Bank of Nezperce brought its suit in a state court on June 27, 1908. Judgment was rendered therein on February 15, 1909. Any counter-claim the bankrupt had must have been plead and adjudicated in that action. A mandatory judgment settles all controversies between the parties that have been, or could have been plead as a counter-claim or cross-complaint in that action. So we see that the authorities referred to would have no application to the facts in this case, and the filing of a claim based upon a judgment does not do away with the conclusiveness and binding effect of the judgment. A judgment is of full force and effect until reversed by a court having authority to modify or change the same, to-wit: *the court in which the judgment was obtained*, and it is immaterial about the question of the statute of limitations as to counter-claims, as there could be none against a valid and subsisting judgment rendered by a court of competent jurisdiction; and there

could be no set-off or counter-claim to such judgment, or the claim based thereon.

In Respondent's points in discussion of authorities we will discuss the proposition of there being no counter-claim that could possibly arise out of the proceedings in the case of Bank vs. Pindel, either under attachment or under execution in that case, or any off-set or counter-claim that could arise therefrom. And in reply to the statement at page 54 we will show that there could be no defense of reduction or recoupment arising out of the transactions in that case that was not litigated by cross-complaint or counter-claim in that action itself.

Page 55, any claim of payment claimed by the Bankrupt's estate must be a payment that is recognized in the law as such, and we will later show that nothing in the proceedings in the case of Bank of Nezperce vs. Pindel, in the state court or proceedings of the sheriff in that action, can have anything of interest for the consideration of this court; and to claim a judgment could be affected by any such matters when filed by the owner as a claim in bankruptcy is simply to absurdly maintain that a judgment has little, if any, binding force or effect upon the parties to the same. A judgment itself carries no burdens only to the person against whom it is taken is the theory of law.

Under Point "a"—While the bankruptcy court has the power to liquidate damages and to set them off against demands on contract, the premise of the statement is wanting when applied to this case. The Bankrupt has no damages, as we will show in Respondent's brief on the law and the facts. And, secondly, the Bank's claim does not rest upon contract but is reduced to judgment, an absolute verity. Hence, Point "a" has no application, or the authorities thereunder, to this case.

Point II, has no application to this case. There is no call for an appraisement of property. The opinion of Mrs. Pindel or of her neighbors as to the value of the property that the sheriff seized is immaterial. The value of the property seized is determined upon the execution sale. And with reference to the sheriff's transaction in this proceeding, we will show that *Bank of Nezperce* is in *no way responsible*. We do not believe this court will recognize as an absolute verity the statements of Mrs. Pindel as the *true* and *absolute* value of property seized by a sheriff nor consider that a judgment can be entered up in a bankruptcy cause against a valid judgment then four years old, and unreversed especially where those offsets are matters that must be liquidated in the *action in which the judgment is obtained*. The prem-

ise of the Petitioner is wrong and the conclusion correspondingly so. The authorities are therefore not in point and we can have no application to the case at bar.

Point III, is in the same situation as the preceding point, resting upon a false premise. Nothing occurring, that *could be* set up as a counter-claim or cross-complaint in the case of Bank of Nezperce vs. Pindel, can be set up as a cross-complaint against the judgment (an absolute verity) of Bank of Nezperce. And, as will be shown in Respondent's affirmative brief and the proceedings, it will further be shown that claimant Bank of Nezperce is not responsible for or accountable to the Bankrupt *for the acts of the sheriff*. The claim for wrongful attachment of personal property will be dealt with directly in respondent's affirmative part of this brief; and therein will be shown that any authorities under this proposition, under Point II, have no application whatever and are irrelevant in consideration of the cause. Bankrupt's own authorities do not sustain either his theory or his contentions in the case. Quoting from *Ruthven vs. Beckwith* (Iowa, 45 N. W. 1073) cited by petitioner sustaining the 9th paragraph of the Syllabus, the Court says, at column 1, page 1075:

“It being the duty of the sheriff to take reasonable and ordinary care of the property, damages resulting from a want of such care are neither legal nor material consequences of the attachment, but of the negligence of the sheriff, for which he, and not the plaintiff, is liable.”

It will be noticed in that case, also, that the defendants (see statement of fact by the Court) were seeking damages by way of a counter-claim in the very action in which they were sued and in which the attachment issued. In the case of *Schofield vs. Territory* (9 N. M. 526, 56 Pac. 306) the action was upon the attachment bond after the attachment had been dismissed and the plaintiff in the action had ceased to proceed in his case upon the attachment. It was dismissed on the ground of the falsity of the affidavit as to removal of property from the Territory, and has no application here. In the case at bar there has been no action upon any bond, and the plaintiff, having started in to make the property of the defendants available for the satisfaction of a judgment, naturally proceeded to make it available. The defendants, knowing that plaintiff was right and within the limits of the law, raised no claim for damages by cross-complaint or counter-claim—evidently never thought of such a thing until, in their employment of numerous and various counsel, they

secured the services of their present attorney. *Miller vs. Baker*, (79 S. W. 187) appears to be an action upon an attachment bond. In the case at bar the property was not wrongfully attached, the first attachment being dismissed for a slight error in the typewriting of the bond.

In suing upon a bond for damages claimed for either the improper or negligent acts of the sheriff, no one would be reached but the *signers* of the bond, and Bank of Nezperce has signed no bond or undertaking whatever in the issuing of either attachment; consequently there is no cause of action, or occasion for action, against Bank of Nezperce, because these bonds are contracts and no person can be made liable only on the exact terms of a contract, and none but those who are parties thereto. Therefore, all the references here, as to holding Bank of Nezperce for any damages on account of the attachment, are first as stated above, not applicable to anything that occurred prior to the judgment, as all that must be brought by counter-claim or cross-complaint in the action itself, and determined in that action at the time of rendition of judgment or it is forever barred. Second, Bank of Nezperce is not responsible for the actions of the sheriff.

No property has been wasted, injured or destroyed, or ever mentioned as destroyed until the hearing upon this objection to the claim of Bank of Nezperce, showing that the spleen and enmity of the Bankrupt and his wife have been at all times, and still are, directed at the Bank of Nezperce, claimant herein, and that the sheriff in this instance is attacked (see p. 6, line 9 of Brief) merely on the ground of it being an excuse to harm or injure the claimant Bank of Nezperce. No action was ever brought against the Bank, and none could have been maintained, and the actions of the sheriff were performed in the summer of 1908 and the spring of 1909, showing that our conclusion that it was merely a pretext for holding up Bank of Nezperce is correct; for they had known at all times, and now know, that they have never had a cause of action against the sheriff and that the Bank of Nezperce is not responsible for the sheriff's acts, and the bonds on attachment have been on file at all times, upon which no action has ever been brought and none could be legally brought.

And any action that could be brought would have been long since barred by the statutes of limitations of the State of Idaho, to-wit, sections 4054 and 4055 in Subdivisions 1-3 and 1-2, respectively, Revised Codes of Idaho: Which portions read as follows:

“Sec. 4054. Within three years :

1. An action upon a liability created by statute other than a penalty or forfeiture ;
2. An action for trespass upon real property ;
3. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.”

“Sec. 4055. Within two years :

1. An action against a sheriff, coroner, or constable, upon the liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution ;

“2. An action upon a statute for a penalty or forfeiture, where the action is given to an individual, or to an individual and the State, *except* when the statute imposing it prescribes a different limitation ;”

Under *Point IV*, the United States District Court has in no way been technical, but has rendered its decision strictly in accordance with the facts and law involved, and has found all the issues of fact and of law properly. These points will be taken up more fully in Respondent’s affirmative brief in this case.

At page 68 of Petitioner’s brief the statements are based upon a wrong supposition. Frank M. Pindel could have filed counter-claim or cross-complaint in

the original action of Bank of Nezperce vs. Frank M. Pindel, in the state court, and must do this in all matters that could be plead up to time of judgment in that action. Bank of Nezperce has not nor has the sheriff at any time been a tort feisor. The question of contribution between tort feisors, while his law may go to that point, has nothing to do with this case. The authorities cited on page 68 have no application and are a little misleading. His special reference of 4 Cyc., 2057e, applies only to advising directing or assisting the officer to seize property *not belonging to the debtor*; Both Bankrupt and wife were liable for that deb. (Additional Trans. of Record p. 4-6). All of those authorities are inapplicable in this case.

Either intentionally or unwittingly Bankrupt's counsel misconstrues the court's decision as to sections 4055 and 4054, Revised Codes. The Hon. District Judge commented upon the Bankrupt's listing the claim of Bank of Nezperce as a valid claim against his estate, never mentioning any offset until the hearing upon this contest of the claim, allowing the matter to pass through the hearing in the lower court and this court as a valid claim to be paid by his estate. See case of Bank of Nezperce et al. vs. F. M. Pindel (reported in 193rd Fed. Rep., 917), the

Court in discussing that (Transcript of Record, pages 38-39) properly holds that the Bankrupt has estopped himself from claiming that it is not now a valid judgment. Further his Hon. states, at line 18, p. 39, Trans. of Record: "A judgment is an adjudication, not only of all defenses actually interposed, but as well of all which might be interposed" a clear and concise statement on that point; and he further adds: "It is thought that not only by the representations made in the schedules, but by an order of May 20, 1911, the Bankrupt is estopped from setting up the counter-claims at this time." And, further, at line 17, p. 41, Trans. of Record, the Court says: "The theory of the law urged by counsel for the Bankrupt is that the defendant may maintain his action against the plaintiff for the negligence of the sheriff in executing the writ, and that the plaintiff's remedy, in turn, is against that officer and his bondsmen. But here the defendant, waits until any remedy which the Bank may have had against the sheriff is cut off by the statute of limitations, and then, for the first time, asserts his claim." And surely the Court is right in this proposition, in holding that it works an estoppel against the Bankrupt. And the Court further saying (same page): "As a further consideration it is to be observed that, upon his

appointment, these counter-claims vested in the Trustee; and it is apparent that if he had brought a plenary suit thereon against the Bank at the time they were first put forward, (June 14, 1913), by the Bankrupt in this proceeding, Section 4054, Subdivisions 3 and 4 of the Idaho Revised Codes, providing for a three-year period of limitations for actions for trespass upon real property, and for taking or injuring personal property, could have been successful pleaded in bar." Thus showing that again it would have been inequitable, unjust and unreasonable not to hold this Bankrupt estopped if there were anything in his contention. And thus it appears that Bankrupt's criticism of the Hon. District Judge upon the construction of 4055 and 4054 of the Revised Codes of Idaho is uncalled for, unjust and unreasonable and that it is not the proposition of the District Judge but the proposition of the counsel for Bankrupt (line 6, p 69 of brief), that is, the "new and strange proposition with no authority to support it."

The estate can have no credit (p. 69, Trans. of Record) for any \$4333.50 for the reason that there is no premise on which to base such a theory. This will be discussed in our

own part of the brief. Any offset up to judgment must be asserted by counter-claim or cross-complaint in the original action, and the ex-sheriff that made the sale was the only person authorized to do so under the facts of the case. Further the time within which a bankrupt or a creditor can object to the amount of the claim is not involved in this matter, in the ordinary acceptance of that term. In this case there can be no objection to the validity of the judgment either here or in the court in which it was rendered. No proper application was ever made therein within the time limit for taking an appeal or for setting aside the same for fraud. So it has passed beyond the point where it can be challenged. Other than as mentioned above it is unnecessary to discuss the suspending of the statute of limitations, or the scheduling of unpaid debts (pages 69 and 70), the Bankrupt himself being estopped by the basis on which this claim rests, and estopped by his own act in reference to the same, to claim any invalidity or offsets against the claim of Bank of Nezperce, and it is in no way burdened by any offsets whatever and there can be no burden on it preventing its allowance. No valid objection has been or can be raised thereto. The Trustee would not have his attention called to any

action with reference to that judgment as long as the Bankrupt himself, by his acts, was indicating that it was valid and subsisting, which is among the elements that go to make up the estoppel of the Bankrupt as mentioned by the Hon. District Judge. It would devolve upon the Petitioner, who desires to argue the proposition to show by the Record that the Referee did not allow a claim when he received it, or when it was presented to him by the Bank, because objections had been made to its allowance. or that the Hon. Referee for "cause" had continued its consideration. There is nothing in the record to show that this claim has not been treated by the Honorable Referee like all the other claims with neglect, except some drummed up probably by Mrs. Pindel. Nearly all claims being allowed after the 14th of June, 1913,—more than two years after the time for presenting claims had expired—and this with all deference to the Honorable Referee. The record will be produced on that point if the court wishes it.

Line 18, page 73 of Petitioner's Brief: We will say that equity follows the law with reference to the offset there mentioned, and that where, under the law, the party has no offset, equity cannot follow out the proposition in allowing such.

Pages 74, 75, of the Petitioner's Brief: We are not surprised at the difficulties of the counsel to determine whether his defense to the allowance of the bank's claim was payment or off-set when the real point has nothing to do with either one. *Nothing has been paid upon the judgment, and nothing can be set off against it*, in this case, and it is a joint obligation of both the Bankrupt and his wife. The claim is based upon an absolute verity, the judgment of a competent court, and there is no claim whatever, anywhere, of the valid payment of the same, or a fact suggesting the propriety of such a claim.

Point V and the authorities (page 76 of Petitioner's Brief) rest upon a false premise. It is again the theory that there is nothing due from the Bankrupt and his wife, or either of them, to Bank of Nezperce. That a valid subsisting judgment of a competent state court can be made subject to set off in a bankruptcy court is a baseless theory.

As to his *Point VI*, (Petitioner's Brief, p. 77 et seq.). The decision of the Circuit Court of Appeals in the action of Bank of Nezperce vs. Pindel, in which Mrs. Pindel was a defendant, was notice to her as such; also, the decision of the District Judge of May 20, 1911, that her claim of the homestead being abso-

lutely exempt was not well taken, and that it would be sold for the payment of the debts; was ample notice to her that the land would be sold for payment of debts if a bid of over \$5000 could be had. Further published notice had been given, creditors had met and had decided to sell, prior to the decision in that case; the Honorable District Judge had found that all parties in interest (Trans. of Rec. ps. 46-47, line 2) had participated in the proceedings bringing about this condition, and, further, the Referee himself (Trans. of Rec. p. 69, line 2) in his own order has found that at least a ten-days' notice to the creditors had been given, of the sale, and that at the meeting "a majority of the creditors and a majority in the amount of claims represented voted to sell the said land." These things were all notice to Mrs. Pindel, and it appears in the decision of the Hon. District Judge that (Trans. of Rec. p. 47, lines 3 and 4). "The Referee thus acquired jurisdiction to make the order, no creditor now appears to oppose confirmation and eight out of the eleven whose claims were filed have in writing expressed their aproval of the order; the three other claims are trivial in amount." Making the objection there set forth by the Petitioner's

counsel irrelevant and immaterial for any purpose or for the consideration of the court on any line.

For counsel to theorize (p. 79, et seq. of brief) on what Mrs. Pindel would do is quite useless. The Court himself suggests, at page 47, (Trans. of Record) that in the event of a new sale a higher bid possibly might be obtained and *assurance* given of good title, but "neither the Trustee nor the Court can furnish such a guarantee" (that the purchaser's title would be exempt from assault).

A mere inadequacy of consideration in sale of real estate is not ground for refusing to confirm the sale, Counsel's citation to *Loveland on Bankruptcy* (pp. 579-580) is from an old edition of that work copyrighted 1899, and the immediate further quotation from that author (top page 580) is as follows: "In cases where the sale has been set aside on account of inadequacy of price, there was such an inadequacy of price as to arouse a suspicion of fraud or collusion."

See Collier on Bankruptcy, 8th Ed., 1910, p. 836 where the author says: "Sales regularly and fairly made will not, as a rule, be disturbed on the ground of mere inadequacy of price, unless for fraud, or the stifling of bids, or the like" (citing authorities).

So the counsel is giving us antiquated misleading or partially stated law on an important proposition, in his case. And the further statement (on p. 80) that not one dollar of the \$10,500 bid could have been ordered paid on the claim of the Bank so long as it was not allowed, is immaterial in this case. The purpose of the sale and the object of the Trustee was to secure the means of paying upon claims, and any that were not allowed would not receive their dividend at that time, and their allowance would be attended to—a matter of no consideration to the Bankrupt in this case. The Bank's claim was not pressed because all evidence necessary for its allowance had long since been given and paid for, and the matter was awaiting the action of the Referee, which action was never token. Finally a new objection was presented, making quite an excuse for the Bankrupt to secure the crop of hay upon the land in question for the year 1913, as alleged in the answer of the Trustee replying to complaint on objections to confirmation of sale.

Counsel's argument, pages 81—is without reason or premise as the Trustee has been seeking to get something done towards settling the Bankrupt's estate, and claimant Bank of Nezperce, with other creditors, has been seeking to get its money. We sub-

mit that, from February 14, 1910, to this time (nearly five years) is too long to be settling an estate, too long for a bank to go without a large sum of money, bringing no returns whatever while a Bankrupt has been allowed to be declared a bankrupt be discharged for two years and still hold onto and take the income from the property he surrendered to creditors. He has been twice graciously allowed by the court to pay fixed, reasonable sums and save the homestead, has failed to comply and now his counsel is urging unfounded, baseless suggestions of sharp practices to mislead the court as to the insincerity and dishonesty of this Bankrupt and his wife.

Bank of Nezperce's claim is now allowed. The requirement of 10 per cent of the purchase money at time of sale was reasonable and in harmony with sound business principles. The staving off of all proceedings by the Bankrupt and wife since the sale shows the absurdity of calling for a \$10,500 cash payment of money that bankrupt urges could be paid on debts or homestead exemptions. It would have resulted in holding another large sum of money non-producing and idle. The dishonest, insincere and unworthy can see those qualities in others by reason of their possessing them themselves.

There is no evidence of the homestead increasing in value. The effort of Bankrupt and wife at first was (having failed to get the land set over as exempt in the Probate Court of Nez Perce County, Idaho) was (see line 44, et seq., page 919, 193 Federal Reporter) to get this court to set the land aside as a homestead worth only \$5000. The Hon. United States District Court on evidence adduced on that point found it worth \$9000 and decision was affirmed in this court (p. 924, 193 Fed. Rep.). On April 5th, 1913, the land sells at a sale, the Hon. United States District Court finds was legally made and fairly conducted, at \$10,500, an exact test of its value, and we then find Bankrupt and wife urging that its value is now too great to allow the confirmation at that figure, and that purchaser Orville M. Collins must be seeking, as president of Claimant, to make \$4000 or \$5000 out of the purchase. Why the land if \$10,500 is not its full value would not sell for more on a re-sale is pointed out by the Hon. District Court in its decision in this case, (Transcript of Record, p. 47, lower half.)

In this connection, Bank of Nezperce's counsel calls attention to what might have been brought up by the Petitioner and will be by Respondents if either questioned or desired. It was before the District

Court. That on April 6th, 1909, at the sale under execution, of the grain and stock, Mrs. Pindel cautioned the bystanders against bidding on the property, "chilled the bidding" and now asks the Hon. United States District Court and this court to award her and the Bankrupt the difference between what the property thus brought under execution sale, its presumptive real value, and the fabulous estimates of values of property presented by them to and found by the Referee. (Transcript of Record p. 23).

If the Referee (in all due deference to the court) and the Pindels and the typewriter, D. E. Wolgamott, are not "acting in harmony against" the Trustee and Bank of Nezperce the record is misleading. Said Wolgamott charges first \$256.25 for this claimant's copy of the evidence taken at Ilo, Idaho, and then sues for \$435.65 (Transcript of Record pp. 86-88). Then he holds the matter off until that record was not in respondent's hands until the time of sending Additional Transcript of Record under this Court's Rule was past. Respondent admits that the \$145.00 at the time of the Court's decision could not be immediately advanced. Yet when the money was in hand he withheld the record for about a week before consenting to surrender it for the money. In the

meantime the date for furnishing additional transcript of record had passed.

As to page 82 and following of Petitioner's brief, the allowance of the claim of Bank of Nezperce is a mere matter of computing the Principal, Costs and Interest, less amount made under process. The Judgment Docket of the District Court is prima facie evidence of the amounts of the Judgment, Costs, amounts made and amounts unsatisfied. (Additional Transcript of Record, p. 7.) The Hon. District Court has computed the amount correctly finding the difference \$3426.03, (Transcript of Record, pp. 36 and 37). The Bankrupt admitted it was \$3427.93 in the schedule of his debts. That finding was made by the Hon. District Court with all the record evidence before him. (Transcript of Record pp. 36-37).

As to filing of claim. The filing date is Feb. 8, 1911. That was an amended claim and included interest, the judgment being entered February 15, 1909. The lower court has computed it properly and correctly, (Transcript of Record pp. 52 and 53), with provision for interest or withholding "pursuant to general rules of law and as the facts may warrant." The amended claim was filed before the hearing of the evidence passed upon in the order of May 20th, 1911, and decision of this court affirming it reported in 193 Fed. Rep. 917, and all facts pertaining to Bank

of Nezperce's claim were, as before stated, introduced in evidence in that hearing. The crops of 1913 supplied the motive for this part of the litigation.

The order of sale stating no terms (Petitioner's Brief p. 82) the presumption would be that the land would be paid for at the time sale would be confirmed, deed ordered and ready for delivery. The Trustee's requiring of ten per cent of the purchase money to be paid down was a wise provision.—It would tend to shut out irresponsible bids and would designate a purchaser that would most likely complete the payment of the purchase money, and would secure the Trustee in making good any deficiency on having to re-sell. It would shut out bidding of the property way above its value (Mrs. Pindel was, and expected to be a bidder at that sale not shown from the record). Such bidding would necessitate a new sale with nothing in hand to meet the difference between the previous and succeeding sale bid. If such a requirement would "chill the bidding" it would temper it to the extent of making the final bid reasonable, and make it enforceable.

Further the presentation to the court of the Trustee's account was proper and reasonable. Why for instance should the Bankrupt having real estate, consisting of two parts, an exempt \$5000.00 part and an unexempt part, be permitted when the Trus-

tee in the start was ready and willing to, and asked to sell, and deliver \$5000 in cash, or the entire property if it did not bring more than \$5000 litigate the matter from that time through May 20th, 1911, and to this day, making the costs and expenses including \$285.70 in this court, and expenses in this case all at the charge of the creditor's part of the land? Why under such circumstances should a Trustee pay over \$5000 in cash to a party that by his wrongful, unjust and unreasonable conduct has caused creditors such delays, made such great costs, and actually keeps in possession of the creditor's interests in the lands, taking the issues and profitt thereof? Why should the Trustee pay this money over to the Bankrupt while he owes for contesting creditors for more than three years and a half actually keeping them out of their money when the money is due him as costs for a groundless litigation forced on by the Bankrupt, or by him and his wife? And as to Bank of Nezperce's claim it amounts to some 12-13ths of the claims and *both the Bankrupt and his wife are liable for its payment.* And it has so far met all costs. Why should the Trustee, or Bank of Nezperce hold judgments for costs, if awarded, while money is being paid over on confirmation of sale to the Bankrupt and wife from which such costs should be paid?

Should these people be adjudged to have litigated a false claim at the expense, or out of the moneys of the Trustee and creditors? or should it be out of the money that might be exempt, but which they can use as they see fit and have seen fit to litigate away? The Trustee's Account, Costs, Attorney fees and exemptions of real estate money we suggest should be settled in this proceeding at the earliest convenience of the court.

A sale is not complete until confirmation.

Point VII of Petitioner's Brief is denied in toto. It is fully analyzed and discussed in Petitioner's Brief under head of *Law of the Case* and following:

Point VIII. This proposition is so clearly analyzed by the Hon. District Court that reference is here made thereto. (Transcript of Record p. 43 line 17 including line 20 p. 44). The \$3831.25 was received by Mrs. Pindel and she had disappeared without paying a cent on the indebtedness of the bank, was what precipitated the litigation. The letter of July 10, 1908, was a prtense at frankness. The sheriff saw Mrs. Pindel on July 10, 1908. As time went by he remembered of having *seen* her and as their acquaintance ripened he got down squarely to doing business without *seeing* her. Her "indefinite conditional proposition" ceased to operate satisfactorily.

REPLYING TO THE ARGUMENT OF RESPOND- ENT.

Petitioner's counsel and the Hon. Referee may not be bound by the interpretation given by the Supreme Court of the State to this state's statutes. The Hon.

District Judge recognizes the binding effect of such interpretations on the United States courts. The point will be treated of later in Respondent's affirmative brief where the Willman vs. Friedman case, 4 Ida. 209, and other cases will be considered, and the interpretation of certain sections of the Code, (Petitioner's Brief pp. 88-90) will be considered. The case of Brosnan et al, vs. Kramer et al., (Cal.) 66 Pac. 979-981 has no application. It is a California case, the pleading showed no "Connection of the mortgage with the lease" so not allowed as a defense. Our Supreme Court has definitely decided against the permitting of a multiplicity of suits passing upon the same in cases precisely like the one at bar.

Page 91 of Brief—We reply there can be no set-offs between the parties to a valid subsisting judgment of a competent court, as to matters connected with the original litigation. This is elementary law. The point is discussed later by respondents.

Page 92 Petitioner's brief. The lower court's statement is clear. The court holds and rightly that

there was no *evidence* of damages under the *first* attachment. The second attachment was valid. The cases cited have no application to that situation. Such a situation is known as "a failure of proof" and needs no law.

His first citation is backed however only by New York citation of early date. While he overlooks or fails to cite the same page Sub. B under "Regular Process" (Cyc. p. 832) the text reads.

"It has been held in many cases that no action lies in the absence of express or implied statutory authority for injuries caused by the mere wrongful suing out of an attachment, but that to give a cause of action it is also essential that the process should have been sued out maliciously and without probable cause" note the numerous authorities sustaining the text under note 16.

The other authorities have no application to this case, are not in point.

Ruthven vs. Beckwith 45 Pacif. 1073 has been mentioned before and syllabus 9 called attention to with extract from decision to effect that damages resulting from a lack of ordinary care on part of sheriff holding properly were neither legal nor material consequences of the attachment. The rules claimed to exist by Petitioner's counsel (His Brief lower half

page 92 and page 93) are not rules at all in this case. The damages if any must be brought in the form of pleaded cross-complaint, or counter-claims into the original case or are forever barred.

Petitioner's Brief page 94. The rule there claimed cannot be regarded as law. Bankrupt's counsel's statements on that page are not supported by his cited authorities. Slightly recapitulating we have already indicated that the bank's claim rests on a valid judgment of a competent court: that Bankrupt's claims for damages arising *prior to judgment* in that case—any damages for wrongful attachment, waste of property or other like claim must be brought in by counter-claim or cross complaint in the original case in the State Court or it is forever barred. That includes everything claimed or that would occur except the sale of the property by ex-sheriff Lydon on April 6th, 1909. Includes any question of damages for excessive levy in attaching in the original case. We might then pass this as fully replied to.

This page 94 however gives the court a clear view of the attitude finally assumed by the Hon. Referee in this case. A slight examination of the law and authorities announced on that page will reveal the groundlessness of the Referee's opinion in the case

and lack of foundation to Bankrupt's Counsel's claims.

The law is the embodiment or statement in abstract of sound business experience and good hard sense. It is absurd to consider that if some slight error occurs in the handling of an attachment the creditor loses all rights, his property, or debt is gone—that the creditor loses all. The debtor's obligation is extinguished without returns to his Creditor. The absurdity of such proportions are manifest in their statement.

Mr. John G. Carlisle editor of "Executions" in Cyc. in 17 Cyc. at page 1394 sub. "D Levy upon debtor's property as satisfaction—1 Personal property" says "It has often been said by different courts that a levy upon sufficient personal property is a satisfaction of the execution; but *it is safe to say that this is no where the law.* A number of early cases in this country demonstrate the absurdity of such a doctrine." In foot note 43 p. 1395 (17 Cyc. the author says quoting from *Peck vs. Tiffany*, 2 N. Y. 451, 456. "*There are some old cases in which dicta are found, that a levy upon sufficient personal property to satisfy an execution is a satisfaction, but that doctrine has long since been exploded*" citing authority * * * * "They say a levy is a satisfaction of the debt; but

every book they cite, and every case they decide, show under what qualifications they speak. They all go back to *Mountney v. Andrews*, *Cro. Eliz.* 237." Then discussing the case the decision quoted continues, "I need not cite authorities to show that such a consequence would not follow. It would be absurd, and contrary to all practice" citing authorities,* * * * *

"The basis upon which this spurious doctrine rested was said to be that by a lawful seizure the debtor lost his property in the goods and henceforth the remedy was against the sheriff if the creditor did not realize his debt" citing authorities.

In 23 Cyc. 1488 sub. b. "Levy unproductive or insufficient" the author says; "The presumption of satisfaction of a judgment from levy on personal property is rebutted by proof * * * * * that the property levied on * * * * * was insufficient to satisfy the judgment." Mr. Freeman on judgments sec. 475, p. 817 says: "None of the decisions assumes that a levy produces any absolute satisfaction" * * * * * p. 818 "It is apparent that the satisfaction, if such it may be called, produced by a levy on personal property is liable to be removed by a variety of circumstances." So we see the authorities cited by Petitioner's counsel by no means sustain his contention, and his theory of the grounds and principles he contends for rests

on false premises and the conclusions attempted to be drawn necessarily wrong. There is no evidence showing the value of the property levied on to be \$6522.00. There is no showing that all property levied on was not sold but at Additional Transcript of Record, p. 7, is shown, deducting all payments, the difference between the total judgment and the amount realized from the property. (Transcript of Record line 25, p. 36). There was still due \$3426.03 less \$131.50, (see Transcript of Record line 21 p. 44) and line 18 et. seq. and p. 52) at which the court finds \$3521.83, with "interest to be hereafter allowed on said total amount from said last mentioned date (Feb. 10, 1910) or withheld pursuant to general rules of law and as the facts may warrant." (Transcript of Record pp. 52 and 53).

It is pretty clear the District Judge saw the inconsistency of Bankrupt's counsel's position taken on page 94 of his Brief and the inconsistency and non-applicability of the legal principles he was urging.

Bankrupt's counsel urges upon this court a little of Mrs. Pindel's testimony (Bankrupt's Brief p. 96) to convince the court that Mrs. Pindel had a contract with Bank of Nezperce for her having and selling some property. It will be seen on reading these statements together that it all narrows down to the letter

set out at Transcript of Record pp. 55 and 56. Out of the record brought here is omitted of course, the objections of counsel to the testimony as to its being irrelevant, incompetent, immaterial and not the best evidence, heresay statements, or statements made by a party not under oath are all omitted. (Transcript of Record, line 22, p. 63). It appears "Harry Lydon" told her "he attached all the personal property." This is her remembrance after some five years instead of the sheriff's returns.

At line 12 p. 54 Transcript of Record, we are to infer Mr. O'Neill was not in a compromising mood when Mrs. Pindel visited him, however, she tells him what she *could* do. "He" (Mr. O'Neill) "said he would see Dowd." Then "after Mr. O'Neill had agreed to this settlement Mr. O'Neill asked me to write a letter to Mr. Dowd and tell him what I could do." (Transcript of Record line 19 p. 54). But why should Mr. O'Neill ask her to write and "tell Mr. Dowd what she could do?" and why should she write such a letter if there was a contract or agreement made by her with Mr. O'Neill? She says she wrote the letter. (Transcript of Record line 19 p. 55). The letter then would be the latest expression undoubtedly, and take the place of all previous talks. As it was going to Mr. Dowd it would be carefully prepared for Mr.

Dowd's future use and reference. Referring then to what she told Mr. O'Neill (line 25, p. 54 Transcript of Record). "I told Mr. O'Neill that I *could* give them 200 acres of standing crop and the hogs and cattle they had attached" she does say she gave the things, but adds: "And I would sell enough of the small teams to pay the note or Frank's account if I could." If she had an agreement why couldn't she? She says: "They accepted the offer." Then she doesn't state or indicate she delivered over the goods. We submit no agreement is revealed so far. Now referring to the letter—the final—written with care statement. (line 4 of letter page 55 Transcript of Record). She says: "I thought best to have them (the hogs) sold to save feed bills on them and if you are *willing to sell them* at a *fair* price and give *me* credit on the note do so." If there *was* an agreement what question could there be about being *willing* to sell, and the price would be fixed or left entirely to Mr. Dowd to sell for what he could get. She wanted credit given to her on the note. Also note the statement "Also you can have the 200 acres of crop if we can *agree* on the *price* of the crop." What *does* that expression mean if there *was* an agreement? Can there be a contract with nothing agreed to? Respondents think it unnecessary to pursue further the

agreement proposition of July 10th, 1908—urged so strenuously by the Bankrupt's very learned counsel. No agreement whatever exists out of or in the letter. The Hon. District Judge's findings thereon are correct, to-wit: "The letter is *wanting* in the *essential elements* of a *contract* and amounts to nothing more than an *indefinite conditional proposal*." (Transcript of Record line 17 p. 44). In passing no agreement can be found in the testimony of Mr. O'Neill. (Transcript of Record p. 56). Mr. O'Neill respectfully suggests that the 4th word in line 23 p. 56 should be *she* not "we" the latter word being an error in the Typewriter's hearing or a misprint.

The Referee, finding that there was an agreement is palpable error. A baseless conclusion.

There being no agreement, the whole proposition it what the Hon. District Court has *truly* found an *indefinite, conditional proposal*, it is not necessary to take the time of the Court to further discuss andthing that might rest on such a baseless conclusion as an agreement made. If there is no premise to the matters discussed in the following pages on this point (pages 96-116) it would be an imposition upon the court, we conceive, to discuss or consider the various suppositions, serious difficulties and legal uncertainties that would drop into the United

States judicial system if there *were* an agreement that might be discussed. We will therefore leave those pages without further consideration. It could be of no value to this Court to discuss what might be if there was no premise on which an argument could possibly be founded, and from such unfounded arguments only wrong conclusions have been or can be drawn.

We next come to the only remaining point discussed in Petitioner's brief, to-wit, sale of property by the ex-sheriff, and briefly mentioning it here, for it is fully discussed in our affirmative part of the brief, we will state that Harry Lydon who sold the property on the 6th of April, 1909, *was* the ex-sheriff of Nez Perce county but was the duly qualified and acting sheriff of Nez Perce county when the property was attached in the case of Bank of Nezperce vs. Frank M. and Sarah E. Pindel; and with the exception of certain hogs and a stallion horse, sold under attachment under an order of the District Court, all of the rest of the property, including growing crops later harvested, the grain retained until spring together with the stock and sold on April 6th, was *held* by said sheriff from the time of the attachment until sale, and the proceeds then applied in conformity with the *terms of the writ of attachment*, in pay-

ment of the indebtedness less the costs in the case and fees of keeper and sheriff.

The construction given the statutes of our state authorizing the ex-sheriff instead of the incoming sheriff to sell that property will be discussed in Respondent's affirmative part of this brief. Having *begun* the execution of process by *taking and holding* all the property under attachment, the officer acquired a right to the property and assumed an obligation and duty which could only be performed by him, and in consideration of the existence of that duty no one had the right to take the property from him, whether sheriff or otherwise for the purpose of a sale by any other person than the ex-sheriff who had thus *commenced* the service of the *final process*. The cases cited on page 118 of Petitioner's brief have no application to this case, and with this brief statement of the situation, we pass at once to the consideration of our own part of the brief, calling attention to the principles that nothing occurring prior to judgment that could be set up in the original case in State Court can be urged in this bankruptcy case; that the judgment of Bank of Nezperce unappealed from, unreversed, absolute at the expiration of a year from its rendition, cannot be modified or changed thereafter and is subject to

no set-offs whatever—a complete and perfect determination of the rights of the parties to that litigation as to all matters plead therein, or that parties had a right to set up in their pleadings whether there set up or not; and that the sheriff who seized the property and was still holding it at the time of calling for the execution, was the only person who could properly receive it and sell the property.

We now pass to the affirmative part of Respondent's brief.

RESPONDENT'S BRIEF, POINTS AND AUTHORITIES.

LAW OF THE CASE

Respondents, the Trustee in Bankruptcy of the estate of Frank M. Pindel and the claimant Bank of Nezperce, uniting in their brief, now call the Court's attention to the law and the principles applicable to the facts in this case. In passing, we cannot see how the Bankrupt's counsel expects this court to consider errors committed by the lower court without bringing to this court the record of the facts which were the basis of the court's decision in the lower court. We cannot see how he can expect this court to, nor can we see how this court can, determine that the

Honorable District Judge in his opinion in the case and his decision upon the points involved can be overruled and shown to be wrong in his decision of the points, and the Referee be adjudicated to be right, unless this Court has before it sufficient of the record to pass upon the points that were before the Referee and the Court. It will be noted in the Transcript of Record (p. 86) that there were 2050 folios of typewriting, some 453 pages of evidence, and the balance of 654 pages, copies of exhibits. Respondents will endeavor to keep within the Record supplied, and will furnish other parts of the record for the use of the Court, if the court will indicate, what it deems would be necessary to fully understand the contentions in this case.

FIRST

The Trustee in Bankruptcy has shown by his return of sale that he has endeavored with all diligence to secure all of the property that belongs to the estate, and has used diligence in seeking to convert that property into money for the benefit of the Creditors. These are duties that devolve upon the Trustee and he has performed them faithfully and energetically. Delays, where there have been any, were

due to the improper interfering and the litigious disposition of the Bankrupt and his wife, particularly of the latter. Transcript of Record p. 43 lower half to line 10 p. 44. The Record shows that it has been almost impossible to get action on the part of the Referee, and here we wish to be courteous and considerate of this court officer; but at line 5 et seq. page 71 of the Transcript of Record appears a statement that is indicative of the situation, to wit, "that affiant (Trustee) had been seeking to obtain for six months an order of sale of real estate prior to the date of said order of March 1, 1913." On same page it shows that the sale of the land occurred on April 5th, 1913, and that the return of sale was immediately made but, on account of the absence of the Referee from Idaho, the return of sale was not mailed to him until April 23, 1913, and no hearing was had thereon until the 14th day of June, 1913, on motion of the Trustee. (Transcript of Record, p. 19). The Trustee refers to the full record of the proceedings which he filed in reporting the sale of the real estate, showing the Petition for the order of sale (Trans. of Rec., p. 81), the order of the Referee directing a sale of real estate (p. 69) the return of sale, including the items and charges for which he claimed compensation (pages 73-81, inc.), and the Notice of Sale; co-

gether with the showing that the notice was published in the Nezperce Herald, a newspaper published at Nezperce, Lewis County, Idaho, showing that the sale was regularly made and fairly conducted, (Trans. of Rec., pages 70-72, inc.), and the proceedings passed upon by the court were found to be in accordance with the foregoing statement, the Court saying, at line 12, p. 48, Trans. of Rec.; "I have thus found that the sale was legally and fairly made," and states at page 46, line 25 and following, Trans. of Rec., what, in effect, the Referee had found (at p. 69, line 10 and following, in Order of Sale) that due notice was given as required by law, of the hearing of Trustee's petition for such order, and that at a meeting of creditors called for that purpose a majority of them, both in number and amount of their claims, appeared and voted in such meeting in December, 1910 in favor of the sale. And the Court further found, from the evidence before him, that "the Referee thus acquired jurisdiction to make the order. No creditor now appears to oppose confirmation, and eight out of the eleven whose claims were filed have, in writing, expressed their approval of the order. The three other claims are trivial in amount." Further, the Court says: "Even if we assume that Mrs. Pindel was entitled to notice, it is

to be observed that she originally appeared and in both this Court and in the Circuit Court of Appeals unsuccessfully opposed the sale." And this Court will further notice that, in the case of *Bank of Nezperce vs. Pindel*, 193 Fed. Rep., 917, bottom of page 922, the Court said:

"We are also of the opinion that, by reason
 "of the court's authority touching the manner of
 "setting aside the homestead, it was empowered-
 "ed to require the property to be sold in the
 "event that the exemptioner was unable or de-
 "clined to pay the \$4000 surplus into the estate.
 "On this phase of the controversy, therefore, we
 "hold that there was no error."

So, as stated by the Honorable District Judge in his order confirming the sale (Trans. of Rec., p. 45, line 24). "Now it is clear that by this order" (of District Judge of May 20th, 1911, affirmed by order of the Circuit Court of Appeals in above-named case) "no discretion was left either with the Trustee or the Referee touching the question of whether the property should be sold, provided a sale could be had, for an amount in excess of \$5000. Only the details of the procedure—the time, and place, and manner of sale —were left to the sound discretion of the Referee." So we see when the court below finds as above, that the sale was legally made and fairly conducted, the order of confirmation of sale by the Honorable District Judge should be by this court affirmed.

AS TO BANK OF NEZPERCE'S CLAIM.

The claim of Bank of Nezperce rests upon a judgment. The case was entitled "Bank of Nezperce, a Corporation, Plaintiff, vs. F. M. Pindel and Sarah E. Pindel, Defendants," and was heard in the District Court of the Second Judicial District of the State of Idaho, in and for Nez Perce County, upon pleadings duly framed and was presented to a jury of twelve men; plaintiff being represented by its counsel and the defendants by their counsel, and a verdict of the jury rendered after the hearing of the evidence of the witnesses for both plaintiff and defendant, argument of respective counsel and the instructions of the court, which verdict was in favor of the plaintiff and "against the defendants F. M. Pindel and Sarah E. Pindel in the sum of Three Thousand Six Hundred and Thirty-five and 16-100ths (\$3635.16) Dollars." (Additional Transcript of Record, pages 4 to 6 inc.). The court in which this decision was rendered (District Court of the Second Judicial District of the State of Idaho in and for Nez Perce County) is a Court of Record, and such a judgment as a proposition of law.

(a). Is conclusive of all issues involved in the pleadings.

(b). Or that might have been litigated therein.

(c). Either by cross-complaint or counter-claim based upon "a cause of action arising out of the transaction set forth in the Complaint, set forth as the foundation of the plaintiff's claim or connected with the subject of the action."

Under these subdivisions:

(a). Section 4350, Revised Codes of Idaho, reads as follows: "A judgment is the *final* determination of the rights of the parties in an action or proceeding." Same as California Code of Civil Procedure, 3 Deering's Code, Sec. 577;

Kerr's California Codes, 577;

Bingham vs. Kearney, 136 Cal., 175; S. C. 68 Pac., 597;

Quirk vs. Rooney, 130 Cal. 525; 62 Pac., 825;

~~In re Hendron's~~ ^{Harrington's} Estate, 147 Cal., 124; S. C. 81 Pac., 546 at 548.

In Bingham vs. Kearney 136 Cal. 175; 68 Pacif. Rep. 597 at 598 the Court says (cited in re Harrington estate): "If she failed to assert her claim properly, or to present the proper evidence in the first suit, she will not now be permitted in a second to litigate it. The principles here stated are elementary." Quoting from Freeman on Judgments, in the same case (4th Ed., Sec. 260); "But if either party fails to present all his proofs, or improperly manages his case, or afterwards discovers additional evidence in

his behalf; or if the court finds contrary to the evidence or misapplies the law—in all these cases the judgment until corrected or vacated in some appropriate manner is as conclusive upon the parties as though it had settled the controversy in accordance with the principles of abstract justice.”

So we see that, whatever may be claimed, even if there was something irregular, improperly decided or in any way contrary to what the Court should find, decided in the case, the Bankrupt and his wife are, under these principles of elementary law, *not entitled to re-litigate* that case in the Bankruptcy Court. And in *Quirk vs. Rooney* the Court (near bottom of second column, page 827), quoting from Vice-Chancellor Wigram in *Henderson vs. Henderson* (3 Hare, 115, and approved in the California court in *Woolverton vs. Baker* 98 Cal., ^{33 Pacif. 731} 632), “The plea of *res adjudicata* applies, except in special cases, not only to points upon which the court was not only actually required to form an opinion and pronounce a judgment, but to every point which properly belonged to every subject of litigation and which the *parties, exercising reasonable diligence, might have brought forward at the time.*”

Futther, in *City of Aurora vs. West*, (7 Wall. 82, 19 L. Ed. 42), the rule is thus stated: But where every objection urged in the second suit was open to the party *within legistimate scope* of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as having passed in rem judicatem and the former judgment in such case is conclusive between the parties."

(23 Cyc., page 1215).

Jones on Evidence, Sec. 585.

The conclusiveness of this judgment is best determined by the decisions of the State of Idaho in the case of *Elliott vs. Porter*, 6 Idaho, 684, (citing *Marsh vs. Pier*, 4 Rawle, 273; 26 Am. Dec., 131), as follows: "A judgment of a proper Court being a sentence or conclusion of the law upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, *which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them, but upon the Courts and juries, ever afterward, as long as it shall remain in force and unreversed.*" And the Court adds in the same case: "A contrary doctrine, as it seems to me subjects the public peace and quiet to the will or neglect of individuals, and prefers the gratification of the litigious

disposition on the part of suitors to the preservation of the public tranquility and happiness.' ” “The judgment of the District Court is reversed, and the cause remanded, with instructions to enter judgment for defendant in the district court, costs of the appeal in favor of the appellant.”

Cited as the law in *Hilton vs. Stewart*, 15 Idaho, 150 at 165. *96 Pac. 579 at 583.*

Having taken no appeal, the judgment stands conclusive between the parties on all questions raised in the pleadings, or that might have been raised in the pleadings. Further, questions as to damages from any loss of stock or other matters arising prior to judgment in the case must have been litigated in that case or they are, under the decisions of the Idaho Court, forever barred, as appeals from judgment in the State of Idaho must be taken within a year from the date of same. An appeal from the order allowing keeper's fees including the care of stock and crops the harvesting and hauling of the grain, must have been taken within sixty days from the date of rendition of the order; and an order with reference to costs which included amount ordered as keeper's fees must have been taken within sixty days from the filing of the order, or it becomes final. The statute (Sec. 4807

Revised Codes of Idaho, Subdivisions 1, first part, and 3) reads as follows:

Time for Taking Appeals.

Sec. 4807. An appeal may be taken to the Supreme Court, from a District Court:

1. From a *final judgment in an action* or special proceeding commenced in the court in which the same is rendered, within *one year* after the entry of judgment.

3. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of the place of trial; from any *special order made after final judgment*; and from an interlocutory judgment in actions for partition of real property, within sixty days after the order or interlocutory judgment is made and entered on the minutes of the court, or filed with the clerk.

(c). The matters which could have been raised and decided in the case by cross-complaint or counter-claim, based upon a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action, must be litigated in this case or they are forever barred under the laws and decisions of the State of Idaho.

The matters pertaining to damages for claimed wrongful attachment must, under those laws and

decisions of the Idaho Supreme Court, be taken advantage of in the original action by cross-complaint or counter-claim.

Revised Codes of Idaho Sec. 4188; Rev. Codes of Idaho, Secs. 4183-4184, subdiv. 1; and Rev. Codes of Idaho Sec. 4185 read as follows:

Affirmative Reliefs Cross Complaint.

Sec. 4188. Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint.

Contents of Answer.

Sec. 4183. The answer of the defendant shall contain:

1. A general or specific denial of the material allegations of the complaint controverted by the defendant.

2. A statement of any new matter constituting a defense or counter claim. If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant. If the

defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground. If the complaint be not verified a general denial is sufficient, but only puts in issue the material allegations of the complaint.

Essentials of Counter Claim.

Sec. 4184. The counter-claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action :

1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action ;

2. In an action arising upon contract ; any other cause of action arising also upon contract and existing at the commencement of the action.

Counter Claim Must Be Interposed.

Sec. 4185. If the defendant omits to set up a counter claim in the cases mentioned in the first subdivision of the last section, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor.

For *two* reasons any evidence as to damages for alleged wrongful attachment, value of property attached and all matters existing or arising therefrom up to the time of final judgment in the original action, was immaterial, irrelevant and incompetent for any

purpose connected with the case, and all points therein attempted to be made by argument by Petitioner's counsel can have no force and effect in this case.

Firsts All such are matters that could be litigated in the original action.

Quirk vs. Rooney, 130 Cal., 505; **62** Pac., 825 at 827;

In re Harrington Estate, 147 Cal., 124; 81 Pac. 546 at 548.

Bingham vs. Kearney, 136 Cal. 175; 68 Pac. 597 (2nd col.) and 598.

Seconds Must be brought in that action or are barred for not so bringing as a matter that could be litigated therein and *to avoid a multiplicity of suits*.

Willman vs. Friedman, 4 Idaho, 209; 38 Pac. 937.

In a case with like facts and citing Revised Statutes Sec. 4113; set out above decided December, 1894, the court, by Huston, Chief Justice, says: "The purpose of the Code is not only to simplify proceedings but to avoid as far as may be a multiplicity of suits." This case seems to determine the law in such cases, in Idaho, and at page 214 citing:

Bank vs. Morris, 13 Iowa, 136;

Reed vs. Chubb, 9 Iowa, ~~22~~ **178**;

Stadler vs. Parmlee, 10 Iowa 23;

Waugenheim vs. Graham, 39 Cal. 169, at 177 and 178.

(See also Stevens vs. Home Savings & Loan Assn., 5 Idaho 741, page 751, ^{51 Pac. 779}). The Court by Huston, C. J., there says, (Referring to sections 4113 and 4188): "These and other provisions of our Codes were adopted to prevent a multiplicity of suits, "to the end that controversies that relate to one transaction should be settled in one instead of a multiplicity of suits."

Givens vs. Kefney, 7 Idaho, 335, bottom of 340-341. ^{63 Pac. 110}

The Court, by Quarles, J., says:

"Under our Code of Civil Procedure (Rev. "Stats. Secs. 4183-4185), the defendant, Givens, "was called upon, and it was his duty so to do, "to set up by way of cross-complaint or counter-claim his said note and mortgage, and it have "his rights thereunder adjudicated."

Burke Land, Etc., Company vs. Wells Fargo & Co., 7 Idaho, 42, at bottom of page 55, Sullivan, J., says: ^{60 Pac. 87}

"This court held in Stevens vs. Association, 5 "Idaho 741, 51 Pac., 779, that 'Sections 4183- "4185 of the Revised Statutes, inclusive, are in- "tended to prevent a multiplicity of suits, and to "settle all controversies and causes of action "between the parties which *arise out of, or are* "connected with, the transaction upon which "plaintiff's action is founded."

The court further says, (p. 56): ^{Pac. 891}

"Section 4353 of the Revised Statutes is as fol- "lows: 'The relief granted to the plaintiff, if "there be no answer, cannot exceed that which

“he shall have demanded in his complaint; but
 “in any other case, the court may grant him any
 “relief consistent with the case made by the
 “complaint and embraced within the issue.’ Un-
 “der the provisions of that section, when an ans-
 “wer is filed, as was done in the case at bar, the
 “court may grant any relief consistent with the
 “case made by the complaint, and embraced
 “within the issues made, whether such relief be
 “prayed for or not.” (Citing authorities). ‘The
 “law of civil procedure in this state prohibits
 “the splitting up of causes of action and a multi-
 “plicity of suits.”

There can be no question as to the interpretation of the statutes of this state by our Supreme Court, upon this subject, and this is conclusive of this proposition.

The Compiled Statutes of the United States, Sec. 914, provide:

“The practice, pleadings, and forms and
 “modes of proceeding in civil causes, other than
 “equity and admnalty causes in the circuit and
 “district courts, shall conform, as near as may
 “be, to the practice, pleadings, and forms and
 “modes of proceeding existing at the time in like
 “causes in the courts of record of the state with-
 “in which such circuit or district courts are held.
 “Any rule of court to the contrary notwithstanding.”

Freeport Water Co. v. Freeport, 180 U. S., 587, 45 L. Ed. 679, at page 687, Sec. column at top of page. Quoting from Burgess vs. Seligman, 107 U. S., 20-27, L. Ed., 359. In that case the court, by McKenna, J., says:

"Since the ordinary administration of the law
 "is carried on by the state courts, it necessarily
 "happens that by the course of their decisions
 "certain rules are established which become
 "rules of property and action in the state,
 "and have all the effect of law, and which it
 "would be wrong to disturb. This is especially
 "true with regard to the law of real estate and
 "the construction of state constitutions and
 "statutes. Such established rules are always
 "regarded by the federal courts, no less than by
 "the state courts themselves, as authoritative
 "declarations of what the law is." * * * * *
 "Acting on these principles, founded as they are
 "on cimity and good sense, the courts of the
 "United States, without sacrificing their own
 "dignity as independent tribunals, endeavor to
 "avoid, and in most cases do avoid any unseemly
 "conflict with the well considered decisions of
 "the state courts."

It has therefore become the imperative law of the
 United States Courts that they shall follow the con-
 structions given by the highest court of the state to
 the statutes of that state.

In the case of *Bank of Nezperce vs. Pindel et ux.*,
 193 Fed. Rep. bottom of page 923, the Court will
 notice where it has already followed this rule ex-
 plicitly, in there holding that it was controlled by
 the decision in the case of *Thorne vs. Anderson*, 7
 Idaho, 421. ^{63 Pac. 592} This court is therefore held by these au-
 thorities in the construction of the statutes of the
 state of Idaho. That causes of action cannot be

split up and that all matters prior to the rendition of judgment, occurring in the case in the state court, must have been set up by cross-complaint or counter-claim and determined in that action; and if not so plead and determined, they are forever barred.

Further as between the parties to this action the judgment is conclusive and it cannot be attacked collaterally in this proceeding.

O'Neill vs. Potvin, 13 Idaho, 721. *73 Pac. 20.*

So the assenting of Mrs. Pindel to make herself subject to the jurisdiction of the Bankruptcy Court part of the time, so as to offset her claimed personal property damages as against the claim of Bank of Nezperce against the Bankrupt's estate, looks very unreal from a judicial standpoint. Besides, jurisdiction cannot be conferred by consent of parties.

It will be noticed in this connection that the meeting of the creditors for the authorization of sale of the real estate occurred before the intervention of Mrs. Pindel in the case, which was in December, 1909, (see Transcript of Record line 26 p. 46 and line 9, p. 69), and that claim of Bank of Nezperce was not filed until February 9, 1911. (Add'l Trans. of Rec. at pages 1-4, at 4.). So that claimant Bank of Nezperce is innocent of being among the claimants who were voting at that hearing. And it thus appears

there were other claimants against the Bankrupt who were then, and have been insisting on this estate being settled, in the way of selling the property and receiving their money. And it thus further appears that the assertions against Bank of Nezperce are matters of prejudice and hatred by the Bankrupt of his greatest benefactor.

The judgment being conclusive of the claim of Bank of Nezperce, cannot be attacked either collaterally or directly in the Bankruptcy Court. It could not be attacked anywhere except by way of appeal or modification, all of which proceedings must be introduced in the court in which the judgment was rendered; and neither the judgment nor the order having been appealed from within the time limited by statute, the above matter is conclusively settled and the Bank's claim thus rests upon that which is the nearest to an absolute verity known to the law, to-wit, an unappealable judgment of a court of competent jurisdiction in which the case was regularly prosecuted and the judgment regularly entered, and the judgment includes damages, or the judgment proper, and the costs; and the costs include keeper's fees in the taking care of real and personal property, harvesting crops in this instance, conveying them to the warehouse, and keeping all property to day of

sale, upon which orders were made, as well as a specific order with reference to keeping of property, none of which were appealed from within the sixty days' limitation fixed by the statute. So it thus appears that the claim of the Bankrupt that there is any offset, any counter-claim, or any diminution of this judgment, is an unfounded as anything could possibly be in law. And we see that the statements of Bankrupt's counsel, unblushingly asserted in one place that he Bank of Nezperce has received property to more than pay its claim, in another place that it has destroyed property to more than pay its claim, are propositions that are absolutely unfounded and ordinarily would merit no attention in a court of law. We mention them, and ask the court's pardon for doing so, because the counsel has so persistently urged such statements in his brief.

We state further that there is no evidence that the Bank of Nezperce has received any property from the Bankrupt, or any money, or other consideration from the Bankrupt, except such as has been obtained from, first, sales under attachment and, secondly, from sales under execution. The \$57 from sale of hogs, mentioned in one place as sold to Dan Morgan, (Transcript of Record p. 54 bottom and 55) was all accounted for in the return of the sheriff on sale of

property under execution. This is not in the report and would not be spoken of here, only that it might come into the mind of the court to know about it; and when the return on the execution was called for, to introduce into the evidence, it developed by the testimony that Mrs. Pindel was the last known to anyone to have the execution with the return in her possession, and that for a period of two weeks (Mr. or Mrs. Pindel testified) they had had the original suit papers out of the clerk's office, *at their farm*, for some two weeks and no execution with return was to be found. This is mentioned for this purpose: If the court insists upon knowing about that \$57, the papers on which the return was based, counsel for Respondents believe, can now be produced and the sheriff can make a new return, should the Court deem it necessary and allow the necessary time and the proper order for the making of a new execution and return. All the sums from the sale of stock, under attachment, and grain and stock, under execution, are found by the Honorable District Judge in his decision herein, (Transcript of Record, line 25 p. 44, and line 28 p. 36 and line 18 p. 52).

It has been the purpose of the Bank of Nezperce to be absolutely fair with the Bankrupt and his estate. The Bank desires nothing but what belongs

to it, and never has been contended for anything but that.

DAMAGES IMPOSSIBLE IN THE CASE.

We wish now to call the court's attention to the claim of damages claimed to be due the Bankrupt by reason of the dissolution of an attachment, by reason of any act of the sheriff in caring for or disposing of property. From what has been said it would appear that the attempting to make use of an attachment in securing an indebtedness due, would be a most risky, hazardous proceeding, and only those with unbounded means, or those very reckless without means would ever venture to ask for an attachment. We desire now to call the Court's attention to three propositions:

(a). Has the Bank of Nezperce, in suing out an attachment that has been dissolved, become liable to the Bankrupt and his wife, or either of them, for any damages whatever? If so, to what extent?

(b). Has the sheriff in attaching property, using ordinary care and diligence, produced liability for which the Bank of Nezperce is either liable or responsible? If he has wrongfully or oppressively levied his attachment, who is responsible for the results—the sheriff or Bank of Nezperce?

(c). Finally, what is the purpose of the statute in requiring a bond when an attachment or other process is sued out, and what purpose does such bond serve in the case?

We think the court is entitled to such assistance as counsel can give it on these points and thereby in a direct way answer without specifically touching upon each point, the peculiar ilne of argument indulged in by Bankrupt's counsel in discussing the liability of Bank of Nezperce; and will incidentally explain what the Bank of Nezperce would be responsible for in the event there had been litigation, or should the presenting of the claim to the Bankruptcy Court be considered as a litigation between it and the Pindels. The argument of Bankrupt's counsel on the various points that he has brought up has been such that it has been difficult to answer the separate propositions without too greatly extending the brief of Respondent.

First, under (a): Has the Bank of Nezperce, in suing out an attachment that has become dissolved, become liable to Frank M. and Sarah E. Pindel for any damage whatever?

Without waving what we have heretofore said, that any liability must be established by appearing in the same case by cross-complaint or counter-claim

and establishing a set-off in the original case, we call the Court's attention now to the *practicability* of using the attachment law and to the fact that Bank of Nezperce has *made reasonable use* of this attachment law; has never abandoned its right to that use; that, as soon as it was apparent that the first attachment would be dissolved, another attachment was immediately levied. And we will now show to the court, calling attention to statutes like our own, that the Bank of Nezperce is in no way liable for suing out a dissolved attachment in this case.

In King vs. Montgomery (50 Cal. 115) the principle involved in this case is set forth. The Court there lays down the rule that plaintiff is not liable for damages only in the event of *malicious* issuing of attachment. The Syllabus reads as follows:

"Damages for Suing out Attachment.—In an "action for damages for maliciously suing out a "writ of attachment and causing the same to be "levied on the property of the plaintiff, the *complaint must aver* that the writ was sued out "and prosecuted *without probable cause.*"

"Dismissal of Action.—When a cause is called "for trial the action may be dismissed on motion "of the defendant if the plaintiff declines to amend."

The decision by the court (Niles, J.), adds:

"The complaint contained no averment that "the action against Dobbs and King was commenced, or the writ of attachment sued out and "executed *without probable cause.* In this the

“complaint was clearly insufficient and the plaintiff declined to amend. The motion to dismiss was properly granted. Judgment affirmed.”

There has been no evidence in this case that Bank of Nezperce was without *probable cause* in commencing this action, and in suing out the attachments. The action was prosecuted with due diligence and the judgment obtained. We will show that this *established probable cause* and that a *lack* of probable cause could not *possibly have existed* in this case. The following authorities maintain the rule above stated, to-wit, that there can be no damages claimed except where the party suing for damages pleads and establishes lack of probable cause in commencing the action and in the suing out of the attachment, or any other writ in which a bond or undertaking is required by law. In passing, we will say the same rule applies to injunction cases as to cases in which an attachment is issued, and the authorities can be used interchangeably under those two heads:

Cary vs. Gunnison, 51 Iowa 202; 1 N. W. 510.

Lindsey vs. Larned, 17 Mass. 196 (Quoted from later).

Hess vs. German Baking Company, 27 Ore. 299; 60 Pac. 1011.

- 10 Encyc. of Pleading and Practice, 1118.
- Burton vs. Railway Co. 33 Minn. 193; 22 N. W. 300.
- Preston vs. Cooper, 1 Dill. 589; Fed. Case No. 11395.
- Stewart vs. Sonneborn, 98 U. S. 187. (Quoted from later). *25 L. Ed. 116*
- Clossen vs. Staples, 42 Vt. 209.
- Palmer vs. Foley, 71 N. Y. 106.
- Butcher's Union, Etc. Co. vs. Howell, 37 La. Ann. 280.
- Eakle vs. Smith, 27 Md. 467.
- Smith vs. Gregg, 9 Neb. 212. *27 N. 437*
- Cox vs. Taylor, 10 B. Mon., 17; 20-21.
- Asevado vs. Orr, 100 Cal. 293, at 297, (Citing 34 Pac. 777).
- Manlove vs. Vick, 55 Miss. 567. (Quoted from later).
- Hayden vs. Keith, 32 Minn. 237. *20 N. 193;*
- Burnett vs. Nicholson, 79 N. C. 548-552.
- Lawton vs. Green, 64 N. Y. at 330.
- Robinson vs. Kellum, 6 Cal. 399. (Quoted from later).
- Keeber vs. Mercantile Bank, 4 Mo. App. 195.
- Grant vs. Moore, 29 Cal. 644, 649, and 656.
- Bulkley vs. Smith, 2 Duer 274.
- Collins vs. Shannon, (Wis.) 30 N. W. 730.
- Doyle vs. City of Sandpoint, 18 Ida. 654; 112 Pac. 204.

In *Robinson vs. Kellum*, 6 Cal., 399, the Syllabus reads:

“An action in the case will not lie, for improperly suing out an injunction, unless it is charged in the declaration as an abuse of the process of court, through malice and without probable cause.”

The decision is a little more extended than the Syllabus and sustains it, absolutely.

In *Asevado vs. Orr*, 100 Cal. at p. 297³⁴⁹²⁰¹⁴⁷¹¹, the court, (citing *Robinson vs. Kellum*), says:

“The courts of the state are open to every litigant for the redress of his wrongs and, unless he is at liberty to seek such redress without rendering himself liable in damages to the defendant, in case he shall fail to establish his complaint this right would, in many instances, be a barren privilege. * * * * * It is only when the process of the court is abused, or when the plaintiff seeks to avail himself of his power to harass or injure another by suing him upon a charge of *which he is conscious of having no right of action*, that he becomes *amenable in damages for bringing such suit*. Such an action, however, is in the nature of a malicious prosecution, and in any action to recover damages, therefore, want of probable cause, and malice, are essential ingredients to the complaint, and must be clearly alleged and proved in order to sustain the action.” Citing *Cox vs. Taylor* 10 B. Mon. 17 supra. Also citing p. 298 “that voluntarily dismissing of the action by the plaintiff was not admission that he had no probable cause in commencing the action.”

In *Hess vs. German Baking Company*, 27 Ore. 299; 60 Pac., 1011, the court, by Bean, J., says:

"It is an elementary rule of law that *no action can be maintained for an injury caused by legal proceedings, except the process of the court is abused through malice and without probable cause. The established remedies are open to every litigant, without penalty, except costs and such damages as are incident to the remedy chosen, unless they are resorted to for the purpose of harassing or injuring the defendant.*"

In this case the judge quotes from Chalmers, J., in *Manlove vs. Vick*, in 55 Miss., 567, as follows:

"It is well settled," says Chalmers, J., in "*Manlove v. Vick*, (55 Miss. 567), "*Both at common law and under statutory provisions requiring the giving of bond as conditions precedent to obtaining certain statutory writs, that no action can be maintained against the party issuing the writs except by showing malice and want of probable cause in their issuance.*"

In *Stewart vs. Sonneborn*, 98 U. S., 187; 25 L. Ed. p. 116 at 119, the court, by Justice Strong, in the 1st par. of the 1st col. of said page 119, quoting from in *Farmer vs. Darling*, lays down the rule in United States Court on this matter; and at 2nd col. of the same page the court says:

"In every case of an action for a malicious prosecution or suit, *it must be averred and proved that the proceeding instituted against the plaintiff has failed; but its failure has never been held to be evidence of either malice*

*“or want of probable cause for its institution;
“much less that it is conclusive of those things.”*

In the case of Bank of Nezperce vs. Frank M. and Sarah E. Pindel the plaintiff was awarded judgment for \$3536.16. This, under the foregoing United States Court authority and other authorities above cited, is conclusive of probable cause.

We do not think it necessary to cite further authorities or further discuss this matter; but, in passing, suggest that the claim for damages against Bank of Nezperce by reason of the first attachment having been dissolved, or by reason of the issuing of the second attachment, is entirely unfounded. So that the wordy abuse of the honorable lower court, of the Trustee in Bankruptcy, and of the claimant Bank of Nezperce, is not very material in this case.

Further, if the Pindels could possibly have any action as claimed by their counsel, an action for damages or otherwise, it must have been by a suit upon the attachment bond and our Supreme Court has anticipated, as we have seen, the Pindels and their counsel, somewhat, in holding that if they have any claim for damages by reason of attachment, they must make good their claim through cross-complaint or counter-claim, as the judgment in the case is *res adjudicata* of all such matters. And we here cite one other authority to show how these contests

by a debtor against creditor, *without paying the demand*, is looked upon by at least one court. In *Lindsey vs. Larned*, 17 Mass., 189, at p. 196, the court by Putnam, J., says :

“In the case at bar, no malice is imputed to the defendant, attachment plaintiff. Anxious to recover a considerable debt, he took the measures, and those only, which under the best advice he supposed adapted to that purpose, without any apparent desire to harass or vex his debtor. Undoubtedly the present plaintiff has sustained considerable loss in consequence of the suits which the defendant instituted, *but it must not be forgotten*, in this part of the case, that the *defendant has never*, to this day, *obtained payment of his debt, notwithstanding all his exertions*, * * * * * But we go upon the ground that *malice* on the part of the defendant is a necessary ingredient in an action of this nature, and that it is *lawful* for any man to *enforce his supposed rights by any lawful process*. * * * * * The opinion of the court is that the non-suit must stand.”

(b). *Has the sheriff, in attaching property and using ordinary care and diligence, produced liability for which the Bank of Nezperce is either liable or responsible? If he has wrongfully or oppressively levied his attachment, who is responsible for the results, the sheriff, or Bank of Nezperce?*

The sheriff is serving process and properly handling same incurs no liability. If he were liable for properly executing process, the office of sheriff would

never be taken by any responsible person. If the sheriff should not be liable, of course the Bank of Nezperce should not be liable where the sheriff uses ordinary care and diligence. If he has *wrongfully or oppressively levied an attachment*, certainly no one is responsible for that, or any acts except himself. If he has not properly cared for property attached, he, *only*, is responsible and his responsibility can be enforced upon his official bond, not upon the litigant. The plaintiff in attachment has nothing to say about, nor is he amenable to any law for the manner in which the sheriff exercises the functions of his office. In *Blanchard vs. ^{Brown} ~~Green~~*, 42 Mich., 3 N. W. Rep. 246, the court says, at p. 248:

“The property, after levy, was under *control* of the *officers*, and *not of the plaintiff in attachment*, to see to the enforcement of the order of restoration which he had procured.”

“Further: “*There was no evidence that Brown was responsible for anything but suing out the attachment, and no evidence that this was wrongful.*”

Gardner vs. Donnelly 86 Cal. 367, bottom 371.

On the dissolution of the attachment the sheriff, only, is liable for not obeying the orders of the court, if there was any liability for any failure to obey.

So it would seem, from the foregoing authorities, that it is impossible to show that Bank of Nezperce

commenced its action without probable cause, as it recovered judgment for \$3536.16 on the verdict of the jury, making it impossible to show that the writ was sued out or prosecuted without probable cause; and it is therefore not possible that the Bank of Nezperce is in any way liable to Mr. and Mrs. Pindel, or either of them, under the attachment. And, further, under the foregoing principles and authorities, they are not liable in any way for any action of the sheriff. If his acts were not proper (and there is nothing to show that they have not been) their only action was upon his official bond, and Bank of Nezperce was not a surety upon that bond, or upon either bond for attachment.

Finally, (c).—What is the purpose of the statute in requiring a bond when an attachment or other court process is sued out; and what purpose does a bond serve in the case?

The purpose of the statute in requiring a bond in the case of an attachment, or of an injunction, is determined by the statute requiring it. And when a plaintiff furnishes a bond, or when an undertaking is furnished by the plaintiff, the plaintiff in the case of the bond, and the sureties in the case of the undertaking, are bound by the terms contained in the bond or in the undertaking. In this state the statu-

tory condition of the bond or undertaking is that *if the defendant recover judgment*, or if the attachment be wrongfully issued, the plaintiff will pay all the costs that man be *awarded* to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

Revised Codes of Idaho Undertaking Publication
of Notice:

“Sec. 4304. Before issuing the writ the clerk
“must require a written undertaking on the part
“of the plaintiff, in a sum not less than two hundred dollars, and not exceeding the amount
“claimed by the plaintiff, with sufficient sureties, to the effect that, if the defendant recover
“judgment, or if the attachment be wrongfully
“issued, the plaintiff will pay all costs that may
“be awarded to the defendant, and all damages
“which he may sustain by reason of the attachment not exceeding the sum specified in the
“undertaking.”

In the first place, the defendants never recovered judgment in the case. No liability arose there. The first attachment, issued June 27, 1908, was dissolved by reason of a defect in the undertaking. A new attachment was levied on August 14, 1908. On the order dissolving the attachment August 13, 1908, the liability under that attachment undertaking was ended as to the time during which the sureties were responsible. There was no demand arising during

that time. There is no claim that the property was not all in the hands of the sheriff upon the levying of the second attachment. There is no evidence whatever of any *damages* by reason of the *first attachment*, from date of its levy to its dissolution.

Further, there never have been any *costs awarded* to defendants in any way, particularly by the only way that such costs can be awarded—a suit on the attachment bond. Consequently there is no set-off on this line. Moreover, in such a suit, unless waived, the parties would be entitled to a jury trial under pleadings properly indicating the issues involved.

Stewart vs. Sonneborn 98 U. S. 187, 25 L. Ed. p. 116 cited above.

Any action on the bond is long since, by the statute of limitations, barred, under various sections of our statutes, heretofore set out. Sec. 4054, subdivisions 2 and 3. Sec. 4055, subdiv. 1. So there is no liability of Bank of Nezperce under either attachment, and no damages or costs have been awarded or will be awarded. Only an Idaho state court would be clothed with jurisdiction to consider such cause or award damages—there can be no costs.

Only the sureties on the undertaking are liable, in any event. Bank of Nezperce has signed no undertaking for either attachment, as before stated. Those

only who signed the attachment undertakings or undertaking are responsible thereon, and they would be bound under the terms of the *written* undertaking, only. So the Pindels have not come in touching distance at to Bank of Nezperce, in their attack in the Bankruptcy court upon its claim. In *McDonald vs. Fett*, 49 Cal., 354, the court by Niles, J., says:

“By the act of signing an attachment bond
 “the surety does not become a participant in the
 “seizure or detention of the attached property
 “by the sheriff, or liable as a trespasser for such
 “acts. His *liability arises* under his contract,
 “merely, and is limited by its terms and condi-
 “tions.

“In *Carter vs. Multin*, 82 Cal., 167, at p. 169,
 22 Pac. 1086.
 “the court by McFarland, J., says: ‘A surety
 “has a right to stand on the prices and terms of
 “his contract; he can be held to no other or dif-
 “ferent contract.’ ” Citing *People vs. Buster* 11
 “Cal. 220 * * * * * “‘If there is any
 “principle of law well settled it is that the lia-
 “bility of sureties is not to be extended beyond
 “the terms of their contract.’ ”

And we wish to say that we do not cite these au-
 thorities or this principle for the purpose of suggest-
 ing or proposing the avoidance of any liability on the
 part of Bank of Nezperce for anything for which it is
 legally responsible, but for the purpose of showing
 the court that in this matter of claiming an offset
 against the Bank of Nezperce on its claim presented

against the Bankrupt, they have *no ground* to go on in *claiming any off-set whatever*. The Honorable District Court has found just what the Bank of Nezperce is entitled to and it is immaterial what the Bankrupt and his wife claim, or what the Honorable Referee in Bankruptcy, in this case, has found in their favor. The finding is simply not law, and His Honor the District Judge must be sustained in his findings and in the law which he has advanced in this case with reference to any offset to the claim of Bank of Nezperce on the basis of anything occurring with reference to the attachment or as to any off-set that might be plead against the claim of Bank of Nezperce resting as it does upon a valid judgment.

THE OFFICER WHO ATTACHED AND HELD THE PROPERTY THE ONLY ONE TO SELL.

The officer who levied the attachment was Harry Lydon. It is conceded he was the duly elected, qualified and acting sheriff of Nez Perce county at the time of the issuing and the levying of the attachment in the case of Bank of Nezperce vs. Frank M. and Sarah E. Pindel in the State Court. Under Sec. 4307 Revised Stateutes, Subdiv. 3, which reads as follows :
Execution of Writ :

Sec. 4307... The sheriff to whom the writ is directed and delivered, must execute the same

without delay, and if the undertaking mentioned in Sec. 4305 be not given, as follows: * * * * *

3. Personal property, capable of manual delivery, must be attached by taking it into custody. * * * * *

Mr. Freeman on Executions, 1st Ed. at Sec. 291, line 4, p. 485, says: "The officer who commences must usually complete the execution of the writ." (This means any writ by which a levy is made.) Mr. Freeman further says:

"His term of office may expire after the levy and before the sale. This does not terminate his authority, nor even confer upon his successor power to make the sale if the venditioni ex'ponas should be *directed to him*. By the levy of the writ upon chattels, the officer acquires a special property therein. This property continues after his removal from office, or even after his death." * * * * * "an officer having commenced to execute a writ must complete it, and cannot release himself from this duty by handing the writ over to his successor."

There is no claim whatever that the proceeds of the property on sale by said Harry Lydon were not paid over for the satisfaction of the judgment obtained after the attachment. There is no claim whatever that Harry Lydon was not the person who had levied the attachment upon the property and was *still holding it as sheriff* at the time of the expiration of his term of office as sheriff and time of the sale April 6, 1909.

The Statutes of this State provide (Sec. 2045) what the former sheriff shall deliver to his successor, which statute reads as follows: —

“Delivery of Property to Successor.

Sec. 2045. Within three days after the service of the certificate upon the former sheriff, he “must deliver to his successor * * * * *

5. All executions, *attachments* and final process, except those which he has executed or *has begun* to execute, by the collection of money or a *levy on property.*”

The record shows that Harry Lydon had attached the property under the second writ of attachment, and was holding the same at the time of judgment rendered in the case, February 15, 1909. It was the duty of the sheriff to still hold this property until such time as the same should be disposed of, *after judgment* for the plaintiff, until the same, or proceeds thereof, should be disposed of for the purpose of or in paying the debt, in whole or in part, upon which judgment was obtained.

It is not the policy of the law that, when an officer is holding property, as this was being held, and other officer, his successor, or other officer, shall interfere with his possession. He is to complete the handling of the property. When he has *completed* the process which he has *commenced* to execute in the *levying* of the attachment, he returns it into the court. Hence

Harry Lydon received this writ of execution; he was still holding the property and liable for it or its proceeds after sale under execution, on his official bond—liable for its safe keeping and for the proceeds being applied in satisfaction of the judgment.

Incidentally we will here suggest, Mr. and Mrs. Pindel are estopped from claiming any damage resulting from a sale of the property by Harry Lydon for the following reasons: Mrs. Pindel participated in the execution sale without any protest upon that point, allowing the officer to take a position which, according to their theory and he holding the same, would be different had they mentioned their objection in advance. By participating in that sale they have therefore admitted that the officer was the proper officer to make the sale and that the sale was regular. And,

Secondly: The Bankrupt and his wife having permitted the time for commencing any action, either by themselves or the Trustee, against the sheriff Harry Lydon, to pass. they are guilty of laches and, as held by the court, have done away with the opportunity of the Trustee to take any steps to protect the estate, allowing the time to pass beyond the limit set by the Statute of Limitations for commencing an action against Harry Lydon both in his individual and of-

ficial capacity. (Transcript of Record line 21 p. 41 and 42.

However, the *claim* of damages for the reason that Harry Lydon was not, *at the time of the sale, sheriff of Nez Perce County*, is not well founded. A sale by him would, in any event, yield the same amount of money, other things being equal, that a sale by the incoming sheriff would have yielded. But Mr. Lydon had the right to receive the execution, was the only one authorized to receive it; he had the right to sell the property and, under our statutes, was the only person authorized to act in that matter. He was the officer *de facto* in making the sale.

Section 4305, Revised Codes, reads as follows :

“Section 4305. The writ must be directed to
 “the sheriff of any county in which property of
 “such defendant may be, and must *require him*
 “*to attach and safely keep* all the property of
 “such defendant, within his county, not exempt
 “from execution, or *so much thereof as may be*
 “*sufficient to satisfy the plaintiff’s demand*, the
 “amount of which must be stated in conformity
 “with the complaint, unless the defendant give
 “him security by the undertaking of at least two
 “sufficient sureties, in an amount sufficient to
 “satisfy such demand, besides costs, or in an
 “amount equal to the value of the property
 “which has been, or is about to be attached; in
 “which case, to take such undertaking.” * * * * *

This section provides that the writ must be directed to the sheriff of the county, (Harry Lydon

was *then* the *sheriff*), must require him to *attach* and *safely keep* all the property of such defendant within his county not exempt from execution—sufficient of it to satisfy the plaintiff's demand. That if the action proceeds will be determined by the amount of the judgment.

Section 4312, Revised Codes, reads as follows:

“Sale of Perishable Property: Collection of Debts.”

“Sec. 4312. If any of the property attached be *“perishable*, the sheriff must *sell* the same in the *“manner in which such property is sold on execution*. The *proceeds and other property attached* by him *must be retained by him to answer any judgment that may be rendered in the action*.” * * * * *

The attachment becomes an execution in effect in the event, a mere incident, of the property being “perishable.”

Section 4315, Revised Codes, reads as follows:

“Sale of Attached Property to Satisfy Judgment.”

“Sec. 4315. If *judgment* be recovered by the *“plaintiff*, the *sheriff must satisfy* the same out *“of the property attached by him* which has not *“been delivered to the defendant, or a claimant* as hereinbefore provided, or subjected to execution on *another judgment recovered previous* to the *issuing of the attachment*, if it be sufficient for that purpose.”

“1. By paying to the plaintiff the proceeds *“of all sales of perishable property sold by him*.
“ * * * * *

"2. If any balance remain due, and an *execution shall have been issued on the judgment*, he *must sell, under the execution*, so much of the *property, real or personal as may be necessary to satisfy the balance, if enough for that purpose remain in his hands.*" * * * * *

Notice: Subdivision 2 of this Section provides that "if any balance shall remain due *and an execution shall have been issued on the judgment*" (Note, this is upon the judgment, not to the sheriff of the county), "*He the sheriff who attached must sell under the (that) execution so much of the property, real or personal, as may be necessary to satisfy the balance.*"

These sections are to be constructed together, and there is also to be construed with them Sec. 2045, Rev. Statutes, subdiv. 5, set out above.

Subdivision 5 of Sec. 2045 provides that "All executions, attachments, and final process he must deliver to his successor, except those which he has executed or *has begun to execute*, by the collection of money or the *levy on property.*" The sheriff Harry Lydon had levied the attachment during his term of office. The judgment was obtained on the 15th of February, 1909. (Additional Transcript of Record, pages 4 and 5) after his term of office as sheriff had expired. The *writ* commanded him to *attach* and *safely keep the property to satisfy the plaintiff's de-*

mand. By Section 4312 (copy on proceeding page) he is to keep the balance *after sale of perishable property to answer any judgment* except taken on execution on judgment obtained before issuing of attachment. In passing, this is the only instance in which the property levied upon by the sheriff can be meddled with while in his hands, and this must be by execution upon a judgment obtained before the attachment issued; and, according to Sec. 4315, the sheriff must satisfy the same (the judgment in which the attachment was issued to him) out of the property attached, except it has been delivered to the defendant or a claimant, or subjected to the execution on another judgment recovered previous to the *issuing of* the attachment. The *expression* of these instances excludes all others in accordance with a general well known principle of the law, “*expressio unius exclusio alteris.*”

The *incoming* sheriff has no right to *take* this property, held under attachment by his predecessor. He has no right to *receive* an execution *issued on the judgment* and *take* it under such execution *from* his predecessor. Only in one instance can the property be *taken away from him under these sections*, that is upon execution in another judgment *recovered previous to the issuing of* the attachment under which

Mr. Lydon was holding the property. And if a further execution is issued after he, as ex-sheriff, has paid out what money he has in his hands, he must *sell any attached property* he holds "if enough for that purpose remain in his hands." The incoming sheriff has no right to take away from, intermeddle with, or touch any property that his *predecessor while sheriff* has *levied an attachment upon* and is *still holding*.

It is clear the provisions of our statutes are designed to prevent difficulties and encounters between the ex-sheriff and the incoming sheriff. The reference in Sec. 2045 excepting those which he has *executed or begun to execute* includes not only an *attachment* long before issued, but also any *execution* that may be thereafter executed in carrying out the purposes for which the attachment was issued, if he had begun to execute it by levying upon property.

In *Sageley vs. Livermore*, 45 Cal. 613, at 614, the Court, by Wallace, C. J., says:

"The writ of attachment issued in the action of *Livermore vs. Stine* commanded the sheriff to attach and safely keep the property of the defendant in that action or so much as might be sufficient to satisfy the demand of the plaintiffs. "This writ had come to the hand of the plaintiff here, while he was yet holding the office of sher-

“iff. He had partly executed it by seizing certain property, and had *begun* to *execute* that portion of its command which required him to safely keep the property. In this condition of things the plaintiff’s term of office, as sheriff, expired, and the first question made is, whether it was his duty to turn over the attached property to his successor in office.”

“This question is to be determined by reference to the provisions of the act concerning sheriffs. (Hitt. G. L., Sec. 6849 et seq.), It is provided by this statute (Sec. 6885, Subdivision 5), (see Sec. 2045, Subdivision 5, Idaho Rev. Codes) that the outgoing shall turn over to the incoming sheriff ‘all executions, attachments, and final process *except* those which he has executed or has begun to execute by the collection of money or a levy on property.’ A writ of attachment in his hands and under which nothing whatever has been done is to be turned over of course. But if the writ has been executed or if the outgoing officer has already begun its execution, it falls within the express exception found in the statute, and is, therefore, not to be turned over to the new incumbent. The Act nowhere provides that property held under a levy of a writ of attachment is to be surrendered to the new sheriff, the only provision as to turning over *property as such* is found in the first subdivision of that section of the act just referred to, and the property there mentioned is ‘the property of *the county*’ in the hands of the retiring officer. We cannot, in the absence of an express provision of the statute, deduce from the statute any duty to turn over to the new incumbent property held under a writ of attachment, for whenever property is so held by an outgoing sheriff, it must be because he has executed the writ so far as making seizure of the

“property, and *has begun to execute it by keeping the property in his possession*, pursuant to “the command of the writ, in either of which “cases it seems to be the intent of the Act that “the officer commencing to execute process shall “complete it, notwithstanding a change of the incumbency.”

In *Perrin vs. McMann*, 97 Cal., 52; 31 Pac. 837, the ex-sheriff was notified to release attached property held after his term as sheriff had expired. He refused, and was sued for \$5000 damages. Judgment was given for the defendant, the ex-sheriff, which was affirmed on appeal for the reason that the party to whom the property had been released was applying to the incoming sheriff for such release, while the outgoing or ex-sheriff was the one who had levied upon the property, and therefore had it in his custody and under his control.

In *People vs. Kendall*, 14 Col. App., 180; 59 Pac. 409 at 410 (top of Sec. Col.), Bissell, P. J., says:

“ * * * It is likewise true that the sheriff to “whom the process is issued continues as the officer, for the purposes of the execution of the “writ, even after the expiration of his term of “service and the appointment or election of his “successor. Under the ancient law—and this is “still the rule in the absence of a statute— “when an *execution* or *attachment* was placed “in the hands of an officer for service, and he “commenced the service, he continued its execution to the end, made sales of the property “thereunder, collected the money, and was re-

“sponsible to the execution plaintiff for the pro-
 “ceeds. It made no difference whether he re-
 “mained in office, or went out of it; whether he
 “was succeeded by another, or succeeded himself.
 “The result in all cases was precisely the same.
 “This rule has in no measure been modified by
 “our statute, but the statute in reality is declar-
 “ative of the provisions of the common law re-
 “specting the duties and liabilities of officers.
 “The sheriff going out of office is given express
 “authority and is directed by statute to proceed
 “with his execution as if his term had not ex-
 “pired, and the sureties on his bond are made
 “liable for any omission of his duty in executing
 “it, to the same extent as though the duty had
 “been performed during his term. Gen. St. 1883,
 “Sec. 603. This general doctrine is supported
 “by a great many cases, a few of which only,
 “shall we cite. * * * * *

In *Landsdon vs. Washington County*, 16 Ida.,
 618, bottom of 624 and 625, the Idaho Supreme Court
 held that the sheriff of a county has the implied au-
 thority enabling him to carry out his granted au-
 thority. This case, while not applying to one like
 the case at bar, indicates that the Supreme Court of
 this state would hold that the authority given by the
 sections of the statute cited, to hold property, ap-
 plies to the satisfaction of any judgment that might
 be obtained, would include all the authority which
 we claim herein; and these sections of our statute
 are conclusive on this point and no one but the sher-
 iff who had commenced the serving of the writ of at-

tachment and the levying upon property and holding it, could have any authority to receive the execution or sell the property.

In passing *we* will say that the old statutes of California and statutes of Colorado upon the subject of attachments and the duties of the sheriff thereunder, and of the outgoing sheriff, are like our own statutes herein referred to; and in confirmation of this point, with reference to the old California statute from which ours is copied, the case of *Wood vs. Lowden* 117 Cal. 235, 49 Pac. 132 shows that the statute of the state of California was changed by statutory enactment making it possible for the new or incoming sheriff to perform certain duties mentioned in the new statute.

The provisions of the Idaho Statute as to the delivery of process to the sheriff's successor in office and the completion of process that the ex-sheriff has executed, or *begun to execute* by the *collection* of money, or a *levy on property* appears to be the common law on that subject, and requires legislation to change the same.

Freeman on Judgments 1st Ed. Sec. 327 first sentence and line 14 et seq. following page.

People vs. Boring, 8 Cal. 406, Decision by Field, J.

This case was decided in 1857 prior to adoption of any Idaho statute (Territory organized 1863) making the rule of decision in that case rule of interpretation of statute in this state, see also

Anthony vs. Wessel, 9 Cal. 103, decided in 1858.

People vs. Kendall 14 Colo. 180, cited above.

Revised Codes of Idaho Sec. 4490a re-enacting Sec. 1, page 20 Laws of 1895 reads as follows:

"Execution of Deed by Successor in Office."

"Sec. 4490a. When the sheriff who has sold
"any real estate shall die, resign, be removed
"from office, or his term of office expire, be-
"fore executing any good and sufficient deed for
"such real estate. such deed may be executed by
"the successor in office of such sheriff with the
"same effect to all intents and purposes as if
"made by the sheriff making the sale."

The California and Idaho statutes, it will be noticed, are *directed to and deal with property* in the hands of the ex-sheriff; so that the authorities and the argument of counsel have no application to this case, by reason of the difference in view taken by the legislature, of what the sheriff should and should not do on the expiration of the term of his office.

We thus see that the Bankrupt and wife were:

First: Conclusively bound by the judgment as against any damages arising from the attachments

by not suing for such damages by counter-claim or cross-complaint in the original action;

Second: That the ex-sheriff Harry Lydon was the only person to, and was fully authorized to receive and levy execution and to sell every article or all the property he held under attachment. If follows, then, that the Bankrupt and wife or either of them, have no claim whatever arising from *any levy* upon or *sale* of property of Bankrupt and wife, or either of them, and that they have nothing to offset on those grounds against the claim of Bank of Nezperce.

This, we believe, covers all the ground and all the points that have been validly urged in this case with reference to the reversal of the decision of the Honorable District Judge in this cause; and, while not specifically touching each and all points separately, set forth by the Bankrupt's counsel, it has been the Respondents purpose to touch upon and answer every point involved in the case and to show that many other points having nothing whatever to do with the case, but by reason of their being injected into the case, are fully answered.

The order confirming the sale of real estate is valid. legal and just. By the sale the purchaser acquired an interest in the land and it should be awarded him by the court.

Respondent's general contention is,

First: That the Bankrupt has brought no record to this court showing any ground whatever for reversing the decision of the Honorable District Court of Idaho in any particular in his decision in effect reversing the decision of the Referee in this cause; and,

Secondly: The Bankrupt has shown no ground for revising in points of law of said decision of the Honorable District Judge.

Respondents respectfully submit this cause for the consideration and decision of the Honorable United States Circuit Court of Appeals, Ninth Circuit.

Respectfully submitted,

Finis Bentley
.....

Attorney for the Trustee Norman J. Holgate;

Eugene O. Weill
.....
Attorney for Claimant Bank of Nezperce.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK M. PINDEL,
Petitioner,
vs.

NORMAN J. HOLGATE, as Trustee of
the Estate of FRANK M. PINDEL, Bank-
rupt, and the BANK OF NEZPERCE,
Respondents.

In the Matter of Frank M. Pindel, Bankrupt.

REPLY BRIEF OF PETITIONER

EDWIN H. WILLIAMS,
of San Francisco, California, and
BEN F. TWEEDY,
of Lewiston, Idaho,
Attorneys for the Petitioner.

Filed

OCT 29 1914

F. D. Monckton,

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Attorneys for the Petitioner.

It would require a brief of a great many pages to successfully and specifically and definitely deny all the untrue statements in respondents' brief as to all matters *de hors* the record. *Such a brief as the one filed by respondents should be stricken from the files.*

There was testimony introduced before the Referee, aggregating 2050 folios, trans. p. 86, *but this evidence is not before the Circuit Court of Appeals.* And not being before the Circuit Court of Appeals, the respondents make untrue and false statements concerning it, even asserting that the evidence in the former matter reviewed by the Circuit Court of Appeals is the same as that making 2050 folios in the case at bar.

Every finding of the Referee is supported by overwhelming evidence, and many of his findings supported by uncontradicted evidence. *Even the Learned District Judge did not change or modify any finding of the Referee.*

The question of the sufficiency of the evidence to support the facts as stated by the Referee and the Learned District Judge is not before the Circuit Court of Appeals at all, *and it is not assigned by the Petitioner that the evidence is insufficient to support the facts stated by the Referee and the District Court.* The petitioner does not ask the Circuit Court of Appeals to weigh the evidence. He merely has had the facts found by the Referee and the District Judge and their conclusions of law certified to the Circuit Court of Appeals so that the *conclusions of*

law of the District Judge may be reviewed and revised and corrected.

When only questions of law are presented for consideration it is an insult to the Honorable Circuit Court of Appeals for respondents to go outside of the certified record, and make statements which are not true, and which, if true, cannot be considered by the Honorable Circuit Court of Appeals.

However, these methods resorted to by respondents in their brief have been their tactics throughout the entire hearing before the Referee. *And such a brief as the respondents have filed should condemn both the Bank of Nezperce and the trustee.*

We did hope, indeed, that the respondents would discuss the questions of law and the petitioner's assignment of errors; *but we have been sadly disappointed.*

They dare not confine their brief to the questions of law presented by the record and assignment of errors. They are afraid of the facts found by the Referee and the District Court.

Mr. O'Neill made objection after objection at the trial, and most of them were repetitions. His tactics delayed the hearing and were most annoying. *But respect for the Honorable Circuit Court of Appeals commands us to keep within the certified record,*

though thereby we cannot also make statements *dehors* the record which would present the true facts touching the conduct of the Bank of Nezperce and the Trustee in the proceedings before the Referee, and all matters not certified to the Honorable Circuit Court of Appeals.

We trust the Court will carefully note all statements of respondents in their brief which are dehors the record.

By statements *dehors* the record, the respondents attempt to prejudice the Honorable Court of Appeals against the Referee. Much of the entire brief consists of these statements; and we cannot extend this brief at the expense of the petitioner to make statements of the exact facts as to the matters and things stated by respondents, and which are not supported by anything in the certified record.

We will refer, however, to one matter to show the malice and injustice of the respondents. At the close of taking the testimony by Mr. Walgamott, presented his bill to the bankrupt. At the same time, Mr. Walgamott presented a like bill, being for one-half, to Mr. O'Neill. Mr. O'Neill refused to pay the amount demanded.

Mr. Walgamott refused to turn the record of the evidence over to the Referee until Mr. O'Neill paid.

Therefore the Referee could not decide the case without the record. And finally, after sparring back and forth, Mr. Walgamott sued Mr. O'Neill and the Bank of Nezperce before the Probate Court of Lewis county.

Then Mr. O'Neill, or the Bank, applied to the District Court—Judge Deitrich—for some kind of orders against Mr. Walgamott, the Referee and the Probate Court. And some orders were made as we understand by Judge Deitrich against the Referee, Mr. Walgamott and the Probate Court. The controversy between the Bank and Mr. Walgamott was submitted to Judge Deitrich and was decided by him. Trans. p. 86. Neither the bankrupt or Mr. Tweedy had anything whatever to do with this controversy.

And it seems to us to be very unfair and unjust for the respondent to so scandalously attack the Referee on account of the controversy between Bank and Mr. Wolgamott. The Bankrupt paid Mr. Wolgamott the \$256.25—one-half of his bill—promptly, but the Bank refused to pay its one-half which was \$256.25.

We have given the facts as we understand them from Mr. Wolgamott. We could take up each attack upon the Referee based upon statements *dehors* the record and show them to be equally as unjust and

malicious. *The delay in Referee's decision was caused by Bank of Nezperce.*

The order of the District Judge on the Walgamott controversy, Trans. p. 86, has nothing whatever to do with the questions to be revised. *Either by mistake in the Pracipe or by mistake of the clerk that order was certified.*

Now, as we understand it, somewhere in respondent's brief it is stated dehors the record in substance that Mr. Walgamott was employed to delay the case. *The Bank of Nezperce agreed to pay one-half of the amount to be paid for the services of Mr. Walgamott, trans. pp.86, 87 and 88, and got into a dispute with him and he held the record; and now the respondents abuse the Referee.*

Of course a claimant which has made false proof of its claim would abuse the Referee. *This is nature,* especially when the Referee decides against such a claimant.

And, at this point in reply, we desire to direct attention to the Bank's proof of its claim, respondent's trans. p. 2, and ask the court to note that, *under oath* it is stated that nothing was paid on the claim or judgment but \$1956.25. *This is false.* This \$1956.25 is the amount realized on the execution sale of the residue of the attached property. Trans. p. 36. And

the \$131.50 was not credited in the proof of claim as a payment on the judgment. For the balance after deducting this payment of \$1956.50 was the claim approved and filed.

Now, the \$131.50 is the amount derived from the attached property on order of the state court before final judgment. Trans. p. 24-25. The referee finds that: "In this case it is admitted that the claim of the Bank as originally filed was not correct." Trans. p. 31. Neither the \$57.00 nor the \$131.50 are credited on the claim or judgment as proved and filed. Trans. pp. 24 and 25. The District Court orders the \$131.50 credited on the judgment or claim. Trans. p. 44. But the 57.00 has never been credited on the claim or judgment.

We ask the court to notice how respondents *endeavor to explain and excuse this false proof of their claim*. If the referee had allowed the claim as proved and filed, he would have defrauded the estate. *There is no escape from this conclusion*. This conclusion is established without saying anything about the damages of \$4333.50, claimed by the estate at the trial before the Referee.

When was this false proof of claim corrected? Not until trial before Referee in 1913. And even now against the positive finding of the Referee that the

\$57.00 was never credited on the judgment the respondents join in an assertion that the \$57.00 is included in the \$1956.25.

Why does the trustee join in the effort to have the Bank's claim allowed? *His attorney signs the brief with the attorney for the Bank of Nezperce.*

Now, what other reasons are there for the Honorable Referee not allowing the Bank's claim as proved and filed? The respondents *as we understand it*, assert that the reasons for the Referee not acting was negligence and his desire to delay settlement of estate. They say he did not allow other claims until 1913.

But let us consult the record again. *We find that an attachment was dissolved; that attached property was destroyed and wasted; that there was a void sale on execution; that the attached property was of the value of \$6522.00 when attached, and that the bankrupt and his estate have only got the benefit of \$1956.25, and \$57.00 and \$131.50, after application of these amounts on the judgment, leaving exactly \$4377.25 of the \$6522.00 unaccounted for. In our original brief, we used \$2000.00 as amount realized on execution sale, making therefore exactly \$4333.50 of the \$6522.00 unaccounted for. This claim of the estate against the Bank of Nezperce is another good*

reason for the Referee not allowing the claim as proved and filed by the Bank.

Now closely examine the reasons the Bank and the Trustee urge in their brief and the reasons the learned District Judge urged in his decision *for depriving the estate of relief against the Bank for this \$4333.50*. The reasons are all technical.

The learned District Judge presents the idea of laches, estoppel, res adjudicata, statutes of limitation, and that such damages cannot be a set-off under section 68 of the Bankrupt act; and the learned District Judge states the facts upon which his conclusions of law rest. *We object to his conclusions of law*. And we know that we have correctly presented his conclusions of law to the Honorable Circuit Court of Appeals for revision.

The Respondents present as reasons why the conclusions of law of the learned District Judge are correct upon the facts discussed by the learned Judge the following:

The judgment obtained by bank merges the damages of \$4333.50, or any damage that might exist in favor of the bankrupt's estate; there was probable cause for the attachment; the Bank is not responsible for waste and deterioration of property; the recovery must be upon the attachment bond; there

must be no multiplicity of suits; the statutes of limitation; estoppel and laches; the execution sale was valid. *If the respondents present other reasons, the court will note them and consider them.*

In the case of Willman vs. Friedman,, 4 Idaho, 209, relied on by the learned District Judge and by the respondents to establish *res adjudicata*, an attachment was dissolved before answer and the right affirmed under section 4188, Codes of Idaho, to recover in main action on cross-complaint against the plaintiff. *This establishes that the attachment defendant has a right in Idaho to recover from the attaching plaintiff alone, without suing on attachment bond.*

In Idaho attachments can only be dissolved for improper or irregular issuance.

Mason, Ehrman & Co. vs. Lieuallen, 4 Idaho, 415;

Sections 4321, and 4323, Codes of Idaho.

Therefore, the question of probable cause or want of probable cause is not at issue on the motion to dissolve an attachment, and yet, where an attachment is dissolved before answer, the attaching defendant can recover on cross-complaint against the attaching plaintiff for actual damages. *The estate of the bankrupt only asks actual damages in the matter of*

allowance of claim under section 68 Bankrupt Act.

The respondents juggle the statutes of Idaho in the attempt to prove that all the damages of the estate are merged in the judgment of the Bank, and mix in the question of the multiplicity of suits. We *hope the court will consult the Revised Codes of Idaho*, and read the Idaho decisions carefully, and thereupon note the places or cases wherein section 4185, Codes of Idaho, is considered or referred to. *It is not referred to in the case of Wellman vs. Friedman, supra.*

Section 4185, *supra*, is relied on by respondents and the learned District Judge to merge all claims for wrongful attachment in the judgment of the Bank. In our opening brief, we have conclusively proven that section 4185, *supra*, does not so merge such damages in the judgment of the Bank; *and we have given the unanswerable reasons.* We need not repeat here.

Let us notice the question of multiplicity of suits. No doubt sections 4183, 4184, and 4188, Codes of Idaho, aim to provide a way for avoiding a multiplicity of suits. Equity has the same purpose. But the question of multiplicity of suits has no relation to *res adjudicata* or merging a cause of action in a judgment.

To illustrate: Section 4185, *supra*, prohibits independent actions on counter-claims under sub-division one of section 4184, *supra*, and does not apply to the second sub-division of section 4184, *supra*. *Consequently*, section 4185, *supra*, cannot merge in a judgment the counter-claims specified in the second sub-division of section 4184, *supra*. And as section 4185, *supra*, does not refer to section 4188, *supra*, at all, it, *therefore, cannot merge these cross-claims to be presented by cross-complaint in the judgment in main action in cases where these cross-demands have not been pleaded and adjudicated in fact.*

And again we demonstrated in our opening brief, the estate's cross-demand did not accrue until after the execution sale and could not be presented by cross-complaint in main action wherein bank recovered its judgment, *and the four theories upon which recovery can be had* are stated on pages 120 and 121 of our opening brief. And a re-discussion here might confuse the court.

The cross-demands were never in fact adjudicated in state court.

The execution sale is void. On pages 99 to 113 of their brief, the respondents seem to attempt to state that writs of attachment and execution are the same, and that the statutes require the writ of execution,

issued on a final judgment, to be directed and delivered by the clerk to the ex-sheriff who is holding the attached property under attachment. *This is absurd.*

Of course, the attachment statutes speak of the sheriff, and require the writ to be issued and delivered to a sheriff, but no attachment statute says that a writ of execution must be issued and delivered to an ex-sheriff *who may happen to have possession of property attached by him when he was a sheriff.*

The writ of execution is a new writ which had no existence while Mr. Lydon was a sheriff. Section 2045, respondent's brief, page 101, does not refer to an execution which had never been issued or delivered to Mr. Lydon when he was a sheriff. *Mr. Lydon could not deliver to his successor a writ he did not have.*

The execution, issued after final judgment, is levied on the attached property, and the possession of the property is thereafter held on the writ of execution to be sold at execution sale. Mr. Lydon never commenced executing the writ of execution which was not in existence before he ceased to be a sheriff.

The writ of attachment and of execution are separate and distinct, and used for vastly different purposes. So in section 2045, *supra* writs of attachment and execution are enumerated. *Mr. Lydon could not*

“deliver to his successor” the writ of execution simply because he had none to deliver.

“The writ of execution must be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk and be directed to the sheriff * * * * *,” section 4471, Codes of Idaho. “Where the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county in the state. Where it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part of it, is situated. Executions may be issued at the same time to different counties,” Section 4476, Codes of Idaho.

Thus it is seen that the writ of execution must be directed and issued and delivered by the clerk to an actual sheriff of some county of Idaho. And Mr. Lydon was sheriff of no county of Idaho when the writ of execution was issued by the clerk on the 8th of March, 1909.

Consequently, the cases cited in the opening brief are directly in point and the cases cited by respondents are not in point, at all.

The court will be amused because of the attempt of respondents to explain and justify the bank’s repudiation of the opportunity Mrs. Pindel gave it to get

its note and expenses paid by private sale of the attached property. The bank introduced Mrs. Pindel's letter of July 10th, 1908, and, when it realized that it was the barrometer of its bad faith, it has striven to make its repudiation of the opportunity appear just and right.

The bankrupt merely relies upon this letter and upon the understanding with the bank to show to the court that the bank was given fair opportunity to get payment without litigation and without the waste and destruction of the attached property and that it was the Bank's repudiation of this opportunity which precipitated all the subsequent litigation and contention, and which prepared the way for the waste and destruction of the property.

Since this is true it is not within the right of the bank to escape responsibility for subsequent damages when it had the opportunity to avoid all damage and get full payment but repudiated the opportunity and forced the continuation of the process of the court against the bankrupt's property.

We do wish all the evidence was before the court so that the court would get the full measure of the contemptible meanness of the treatment of the bankrupt and his wife, but to print all the evidence is impossible and absolutely unnecessary. We are not pre-

senting to the court questions of fact. We are presenting only questions of law.

And the certified record presents all the questions of law to the court for revision and correction. For this purpose the record is complete.

For the Court of Appeals to determine whether there is a bar by limitation or res adjudicata, or a valid execution sale, or payment of judgment, or a set-off or a valid trustee's sale or other conclusions of law which are erroneous, needs no more or other record to be certified.

The question of the settlement of a solvent estate is presented by the record, and the record sufficiently presents every conclusion of law of the learned District Judge, and, from and upon the record, the Honorable Court of Appeals can determine whether the conclusions of law of the District Judge are correct or erroneous.

We regret, indeed, that the joint brief of respondents exhibits so much malice and passion, even though we know that such a brief clearly indicates to the court the want of a disposition of the respondents to do unto others as they would have others to do unto them. We think the brief should have been confined to the record, and that it should not have contained so much *dehors* the record.

The opinion of the Honorable Referee is dignified. He merely states the facts and discusses and decides the questions of law. No where does he show prejudice toward the Bank or the Trustee.

If he is to be condemned for rendering an impartial and able decision then it will be very difficult to secure the services of competent and able lawyers as Referees in Bankruptcy. *He is entitled to respect. He is entitled to respect just as much as is the Learned District Judge, or any other judge of a court.* I think all will agree to this statement.

The abuse of the Honorable Referee is not necessary to the consideration of the questions of law involved. Such abuse does not come with much force from the Bank of Nezperce when the record conclusively shows that in its proof of claim it did not give credit on the judgment for \$131.50, which had been received by the attorney, or which Bank stands charged with acts which make it liable in a larger sum to the bankrupt's estate, and which indicate the absence of justice in all its transactions by the record presented and narrated and described.

To show a sample of unfair argument, we refer the court to pages 56 and 57 of respondent's brief. Neither the Honorable Referee or the Bankrupt's attorneys maintain or maintained that a levy on sufficient

personal property was or is a satisfaction of a judgment, but the proposition is that a levy on sufficient personal property to satisfy a judgment raises a *prima facie* presumption of payment to be rebutted by the judgment creditor, and that, where sufficient personal property has been levied on to satisfy the judgment and there has been waste and destruction of the property or a great part of it, the *prima facie* presumption of payment of the judgment becomes a conclusive presumption of payment.

Why should respondents put something in the mouth of the Referee or of the attorneys for the bankrupt and then cite authority to demolish a contention that neither advanced?

A close examination of the brief of respondents will demonstrate that their statements of the contention of bankrupt's attorneys, and of the rulings of the Referee and of the District Judge are as far from the truth as it is for them to assume that anybody has contended or ruled that the levy on sufficient personal property is a satisfaction of a judgment.

That the questions of law now presented for revision have never been before the court in the hearing referred to by respondents in their brief is self-evident. Did the court allow the claim of the Bank

as proved and filed on the former hearing before the Court of Appeals? *That question was not involved, at all.*

Did the court in the former hearing have the same facts and questions of law as are presented by the record in the case at bar before it for decision? *Certainly, not.* Consequently, it is very foolish for respondents to contend that these facts and questions of law were before the court in the former hearing.

A trial of the objections to the allowance of the claim of the bank as proved and filed must be had before the issues as to its allowance can be before the court. *And there was no trial on these objections until 1913.*

There was no sale of the homestead until 1913. Consequently, *the bankrupt could not object to a confirmation until 1913.*

Never before has the question of ascertainment of the entire liability of the estate been before the court, nor the offer of bankrupt to pay everything in full, when ascertained. *The bankrupt proposes to pay everything in full, and the respondents have not proven that he cannot do so as soon as the entire responsibility is ascertained.*

Nor do we understand that respondents have attempted to establish in their brief that all of the

money ordered paid in by the District Judge to redeem the homestead will ever be needed for full payment of the entire liability of the estate.

There are many other weaknesses of the brief of respondents that we would like to disclose, *but we must conclude this brief.*

We feel that the errors of the learned District Judge in his conclusions of law must reverse his orders and require affirmance of the Referee, or else a reversal of his orders with directions to him to proceed according to law.

Respectfully submitted,

.... Ben F. Tweedy

.....

Attorneys for Petitioner.

10
No. 2439

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United States Circuit Court of Appeals

For the Ninth Circuit

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In the Matter of FRANK M. PINDEL,
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ADDITIONAL AUTHORITIES ON BEHALF OF PETITIONER.

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Lewiston, Idaho,

EDWIN H. WILLIAMS,

San Francisco, California,

Attorneys for Petitioner.

Filed this **Filed**day of November, 1914.

NOV 25 1914

FRANK D. MONCKTON, Clerk.

By **F. D. Monckton,**Deputy Clerk.

Clerk.

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ADDITIONAL AUTHORITIES ON BEHALF OF PETITIONER.

In the haste of preparation of the reply brief filed by the petitioner herein a few very important authorities were overlooked and we file this brief to bring these additional authorities directly to the attention of the Court.

One of the main contentions on the part of the respondents is that the claim of the petitioner (which is urged as a setoff to the claim filed against

his estate in bankruptcy by the Bank of Nezperce) is barred by the Statute of Limitations. The party urging this setoff is the bankrupt himself, Frank M. Pindel, and it is conceded that this setoff was not barred by limitation at the time the bankruptcy proceedings were filed. (The action against the bankrupt in which the wrongful attachment was issued was commenced June 27th, 1908, and the bankruptcy proceedings were filed February 14th, 1910. Section 4054 of the Idaho Code provides a three year limitation for actions of this character.)

As the bankrupt was in a position to urge his claim for wrongful attachment at the time the bankruptcy proceedings were commenced he comes within the rule which is stated in

Remington on Bankruptcy, Sec. 1791.

“Suit may be commenced by the trustee upon any action that was not barred by limitation at the beginning of the bankruptcy, and may be so commenced at any time within the two years after the closing of the estate, notwithstanding the State statute of limitations may bar the action before the two years have expired. In short, the Act creates a new statute of limitations, except as to actions already barred when the bankruptcy proceedings were instituted.”

The respondents also contend that the ex-sheriff had a right to make a sale of the personal property seized by him under a writ of execution *issued after*

his term of office had expired. That this is not the case plainly appears from

Rorer, Judicial Sales, 2 Ed., Sec. 888, page 343.

“A levy and sale made after the official term of the officer expires and when his official power has ceased, or after his removal from office, is simply void. But otherwise, if the writ be levied by him before his office ceases in either manner above named, and only the sale be made after the term of his office.”

A claim for unliquidated damages for a wrongful attachment, such as is urged by the petitioner in this case, is in all its essential features similar to an ordinary claim for conversion. It arises out of the unlawful seizure of personal property, that is the taking and detention of personal property which belongs to the bankrupt, without legal cause. The taking of this property by the agent of the Bank of Nezperce after a void execution sale made to it by an ex-sheriff having no authority so to do constitutes a case of conversion pure and simple.

A claim for conversion has always been proveable in bankruptcy, even though the damages are unliquidated.

Collier Bankruptcy, 8th Ed. page 717, referring to Sec. 63 B.

“Sub-division ‘B’ permits the liquidation and subsequent proof and allowance of an unliquidated claim against the bankrupt. The law of 1867 permitted the liquidation of damages for conversion only, that, as has been

shown, was (aside from debts grounded in fraud and embezzlement) the only tort liability provable. The words of the present law are much broader and seem to be taken from R. S. Sec. 5068, which regulated the liquidation of contingent debts and contingent liabilities."

Also

Loveland Bankruptcy, 4th Ed. Section 325.

"It is now well settled that where a claim arises ex delicto, but is also of such character as to constitute a claim on the theory of a quasi contract, the debt is provable in bankruptcy under Section 63, Clause 4. The right to prove such claims is not waived by suing to recover damages for the torts."

Such a claim, being provable in bankruptcy, the bankrupt naturally can make avail of it as a setoff against the ordinary contract claims of his creditors.

In re Harper, 175 Fed. 412.

The validity of the petitioner's claim for wrongful attachment is not affected by subsequent acts of his attaching creditor. His attorneys here claim that a second valid attachment was levied after the first wrongful attachment and that a judgment was finally secured in the action. Neither of these things can cure the tort of the attaching creditor in levying his first wrongful attachment as appears from a multitude of cases cited in the Century Digest under the head of "Attachment" in Sections 1351 and 1352.

The petitioner here contends that the findings of fact made by the referee in the opinion filed by him, which was incorporated in the transcript, are in no particular reversed by the decision of the Judge of the District Court. The Judge of the District Court differed from the referee merely in his conclusions of law from the facts found.

However, if the opposite were the case we think that the findings of the referee on a question of fact should prevail over those made by the Judge of the District Court, under the authority of the case of

Smith Pine Co. v. Trust Company (C. C. A.
5th), 141 Fed. 802.

In that case a finding made by the referee was reversed by the District Court and the Circuit Court of Appeals held that as the referee had personally heard the evidence the finding made by him should prevail. The Court says:

“The bearing of the witness, his appearance, his general interest and deportment are, in many cases, as important in determining the truth of evidence, as the words he uses, and the Court should not always set aside findings which do not conform to the written evidence.”

Respectfully submitted,

BEN F. TWEEDY,

EDWIN H. WILLIAMS,

Attorneys for Petitioner.

No. 2446

United States
Circuit Court of Appeals

For the Ninth Circuit.

H. VAN LUVEN, as Trustee in Bankruptcy of
the Estate of W. L. HOLMAN COMPANY,
a Corporation, a Bankrupt,
Appellant,
vs.

JUDSON MANUFACTURING COMPANY and
M. GREENBERG'S SONS,
Appellees.

In the Matter of W. L. HOLMAN COMPANY, a
Corporation, Bankrupt.

Transcript of Record.

Upon Appeal from the United States District Court
for the Northern District of California,
First Division.

Filed

JUL 31 1914

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States in and for
the Northern District of California, First
Division.*

No. 7936—IN BANKRUPTCY.

In the Matter of W. L. HOLMAN COMPANY, a
Corporation,

Bankrupt.

**Praecipe for Transcript of Record for Use on
Appeal.**

To the Clerk of the Above-entitled Court:

Please prepare a transcript of the record in the above-entitled matter to be used by the undersigned trustee on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, under Section 24a of the Bankruptcy Act, from that certain order of the above-entitled court made and entered herein on the 28th day of April, 1914, reversing the order of A. B. Kreft, Esq., a referee in bankruptcy of the said court, awarding to the said trustee in bankruptcy as against the Judson Manufacturing Company and M. Greenberg's Sons the sum of \$3,682.82 held by the City and County of San Francisco, State of California, a municipal corporation, as stakeholder between the said trustee in bankruptcy and the said Judson Manufacturing Company and M. Greenberg's Sons.

Please include in the said transcript of record the following documents:

- (1) This Praecipe.
- (2) Statement of evidence as per statement lodged herewith or as finally settled by the District Judge.

- (3) Order of referee awarding to trustee in bankruptcy as against Judson Manufacturing Company and M. Greenberg's Sons \$3,682.82 in hands of treasurer of City and County of San Francisco.
- (4) Petition for review of order of referee. [1*]
- (5) Certificate of referee on review.
- (6) Opinion and order of District Judge reversing order of referee.
- (7) Petition for and allowance of appeal.
- (8) Assignment of errors on appeal.
- (9) Citation on appeal.

Dated June 19th, 1914.

HENRY G. W. DINKELSPIEL,
J. M. THOMAS,
REUBEN G. HUNT,

Attorneys for H. Van Luven, Trustee of the Estate
of the Above-named Bankrupt.

Receipt of a copy of the foregoing praecipe is
hereby admitted this 19th day of June, 1914.

S. ROSENHEIM,
Attorney for the Said Judson Mfg. Co. and M. Green-
berg's Sons.

[Endorsed]: Filed Jun. 19, 1914, W. B. Maling,
Clerk, at 2 o'clock and 30 min. P. M. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [2]

*Page number appearing at foot of page of original certified Record.

(Title of Court and Cause.)

Stipulation for Diminution of Record.

It is hereby stipulated and agreed by and between Judson Manufacturing Company and M. Greenberg's Sons, and H. Van Luven, as trustee of the estate of the above-named bankrupt, that in making up the record on appeal by the said trustee in bankruptcy from the order of the above-entitled court made herein on the 28th day of April, 1914, reversing the order of A. B. Kreft, Esq., a referee in bankruptcy of the said court, awarding to the said Judson Manufacturing Co. and M. Greenberg's Sons as against the said trustee in bankruptcy the sum of \$3,682.82 held by the City and County of San Francisco, a municipal corporation, as a stakeholder between the said parties, the clerk of the above-entitled court shall, in following the Praecipe now on file herein, omit the full title of court and cause except upon the said Praecipe, and thereafter refer to the same simply as "Title of Court and Cause," and omit all verifications and refer to the same simply as "Duly Verified," and omit from the petition to review referee's order the notice of decision and the order therein contained. [3]

Dated July 3, 1914.

SAMUEL ROSENHEIM,
Attorney for Judson Manufacturing Co. and M.
Greenberg's Sons.

HENRY G. W. DINKELSPIEL,
J. M. THOMAS,
R. G. HUNT,
Attorneys for Trustee in Bankruptcy.

[Endorsed]: Filed Jul. 6, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [4]

(Title of Court and Cause.)

Approved Statement of Evidence upon Appeal.

(Judson Manufacturing Co. and M. Greenberg's Sons.)

BE IT REMEMBERED that on the 26th day of August, 1913, the controversy between the trustee in bankruptcy herein and Judson Manufacturing Company and M. Greenberg's Sons as to the title to the sum of \$3,682.82 held by the City and County of San Francisco, a municipal corporation, as a stakeholder between the said trustee in bankruptcy and the said Judson Manufacturing Company and M. Greenberg's Sons, came on regularly for hearing before Hon. Armand B. Kreft, referee in bankruptcy, the said Judson Manufacturing Company and M. Greenberg's Sons being represented by Samuel Rosenheim, their attorney, and the said trustee in bankruptcy being represented by Henry G. W. Dinkelspiel, J. M. Thomas and Reuben G. Hunt, his attorneys, whereupon the following proceedings were had:

The trustee in bankruptcy had caused to be issued upon the treasurer of the said municipal corporation an order to show cause why he should not pay over to the said trustee the said sum of \$3,682.82 alleged by the said trustee to be a part of the bankrupt's estate. The said treasurer appeared before the referee, disclaiming any interest in the said sum, but as-

serting that it was claimed by Judson Manufacturing Company [5] and M. Greenberg's Sons, and taking the position that he was a mere stakeholder between the trustee in bankruptcy and the said Judson Manufacturing Company and M. Greenberg's Sons as to the said money. The said Judson Manufacturing Company also appeared before the referee and asserted title to the said sum as against the said trustee in bankruptcy.

Evidence was offered and received upon this issue, a statement of which is as follows, to wit: [6]

Testimony of Marshall A. Frank.

Direct Examination.

In this matter I acted generally for the Pacific Coast Casualty Company. The Holman Company applied to the Pacific Coast Casualty Company to give a bond guaranteeing the completion of a number of cars they were going to build for the City and County of San Francisco. After an investigation on the part of the Casualty Company it was thought safe to issue the bond, providing the money received from the city for the payment of the cars was turned over to the Casualty Company and they in turn had the opportunity of applying that money to pay for the manufacture of the cars. Mr. Riess, representing the Holman Company, accepted this condition, and these agreements dated June 11, 1912, known as Trustee's Exhibits Nos. 2 and 3, were the agreements drawn up to carry out this condition. The bond of the Casualty Company in the sum of Fifty Thousand Dollars (\$50,000) was then issued on behalf of the Holman Company for this contract and the payments

(Testimony of Marshall A. Frank.)

were made by the city to the Casualty Company. These agreements known as Trustee's Exhibits Nos. 2 and 3 were never cancelled.

There were some later proceedings in the matter between the Casualty Company and the creditors in which I represented [7] the Casualty Company. The creditors appointed a committee, and they wanted the right to distribute the fund that was coming into the hands of the Casualty Company instead of the company making that distribution, and an agreement in writing was made by which the money that was to be paid to the Pacific Coast Casualty Company could go to the committee of creditors and be disbursed by them in place of the company making the disbursements. The moneys were distributed after that by the committee.

Q. For what purpose did the Casualty Company receive this money from the city under the contract?

A. For the purpose of paying the people that furnished material and labor in the construction of the cars.

Q. Was that the reason and intent of making the agreements of June 11, 1912, that you have testified about? A. Yes.

Q. Was the object that the Casualty Company wanted to protect itself on its bond as against claims that might be made by these people against the Casualty Company by reason of the bond having been given? A. That was one object.

Q. Yes, and that the claims of these creditors should be paid?

(Testimony of Marshall A. Frank.)

A. Yes; that is, the creditors of the cars.

Q. These creditors who had furnished materials and labor that went into the cars? A. Yes.

Q. Well, was the object of the agreement the protection of the creditors who might furnish materials for the construction of the cars? A. Yes.

Cross-examination.

Q. When the Holman Company approached you to write a [8] bond for them and you asked them for the execution of the agreements known as Trustee's Exhibits Nos. 2 and 3, did you ask them for these instruments for your own protection or for the protection of the creditors? A. Well, for both.

Q. What relation did you have to the creditors?

A. Our relation with the creditors was this: That we had told a good many people that were going to furnish material to be used in the construction of these cars, that we would receive the payments and would see that they were paid.

Q. Did you have any written agreement or any agreement? A. No.

Q. Was there any contract of any kind between you and the creditors?

A. There was only a moral obligation, but it was never carried out to our understanding.

Q. Supposing that the Holman Company had defaulted in its contract with the city and the entire amount in your hands, remaining in your hands, collected from the city, was due the city for a breach of this contract with the Holman Company, would

(Testimony of Marshall A. Frank.)

you have retained that money for your own protection or would you have still paid it to the creditors?

A. Well, I would have to be governed by circumstances in a case of that kind. That would all depend upon which obligation we considered to be the paramount one, to protect ourselves or to protect the people that we said we were going to protect.

Q. And was the purpose of making this contract to protect yourself or to protect others?

A. To protect both.

Q. If the purpose was to protect both, then if the [9] creditors' claims in this matter amounted to more than your claim would you pay the creditors?

A. That I could not answer.

Q. Your agreement with the Holman Company provided that you should collect your money in the name of the Holman Company? A. Yes.

Q. And that the money should be deposited in the bank and distributed on checks signed by you and by the Holman Company? A. Yes.

Q. Now, was it your object in doing that to handle the money on behalf of the Holman Company, to see that it went to the proper channels?

A. Yes, that was one of the objects.

Q. Did you receive any collateral or security for the writing of the bond? A. None whatever.

Q. Didn't you regard these agreements as your collateral security?

A. Well, they were neither collateral nor security. They were simply orders to collect money so that we could see that the people who furnished material

(Testimony of Marshall A. Frank.)

were paid. I would not regard them either as collateral or security. I testified here before the referee about the first of May in this bankruptcy matter.

Q. Did you or did you not on Thursday, the first day of May, in this bankruptcy matter before the referee, in answer to a question of the trustee, regarding Trustee's Exhibit No. 5, the agreement in which you agreed to turn over all money to the creditors:

"Q. What was the occasion of the Casualty Company entering into this agreement?" say as follows:

"A. Well, the City and County of San Francisco, through its representatives, demanded that it be done; that we had no right to distribute the money, [10] or keep the money of the creditors; that they should make their own distribution."

A. I can't recollect my answer.

Q. Did you or did you not at the same place and time in answer to a question of the trustee: "Q. What do you mean by saying that they should make their own distribution?" say as follows: "A. Well, the creditors thought that they were entitled to it and that it ought to be paid to them. They contended and the City and County contended that the Casualty Company should give the money to the creditors, in other words, its collateral that it had received for the writing of the bond should be turned over to the creditors; that is, those creditors who furnished material and labor for the cars. The city assumed the position that it was getting the cars and that it was its duty to see that the money for the cars went to those people who furnished the labor for the cars."

(Testimony of Marshall A. Frank.)

A. This is apparently from my testimony. I will admit it as such, but I don't remember my answers after four months to these questions.

Q. Will you state that you received no collateral security?

A. Well, I do not say so there. I call it collateral. That does not make it collateral. As a matter of fact, if in April I thought it was collateral, to-day I would not think it so.

Q. What did you mean in April by the word "collateral" that was in your answer?

A. I was designating something that the company took for its protection and I called it collateral.

Q. What was it that the company took for its protection in this case?

A. These two agreements, Trustee's Exhibits Nos. 2 and 3. [11]

Q. Then did you also refer at that hearing to Trustee's Exhibits Nos. 2 and 3 as security?

A. I testified to that.

Q. If at that hearing to which I refer you spoke of the security which you received for the writing of this bond, you meant these two agreements, Trustee's Exhibits Nos. 2 and 3? A. Yes.

Redirect Examination.

I attended all the conferences in respect to the matter of the Union Iron Works taking over the Holman Company contract. The city forced the Holman Company to make a contract with the Union Iron Works to complete the twenty-three cars. The Holman Company entered into that contract with the

(Testimony of Marshall A. Frank.)

Union Iron Works on the basis that the Union Iron Works would construct the cars and would take over all material that had been delivered to the Holman Company intended to be used on these twenty-three cars and that the Union Iron Works would pay for that material. This was agreed to at a conference sometime in the Mayor's office, January, 1913. The Union Iron Works agreed to take over and complete the twenty-three cars and they were to receive the amount of money that was to come to the Holman Company if the Holman Company had completed the cars. They also agreed to take over any material that had been delivered to the Holman Company for the twenty-three cars and any that had been contracted for by the Holman Company and pay for it. They were to build the cars without making any charge against the Holman Company whatever excepting for the erection of a shed for which the company was to allow them \$5,000, but with the understanding that if the Union Iron Works made a profit, this \$5,000 charge was not to be made, and with that understanding we left the office of the Mayor and the *Union Works* proceeded [12] to build the cars. To the best of my knowledge, the Union Iron Works took over the material. After that time some written agreement was made between the Union Iron Works and the Holman Company which was shown to me by Mr. Moses, and it was not made in accordance with my understanding of what was going to be done. The attorney for the Holman Company who drew up the agreement with the Union

(Testimony of Marshall A. Frank.)

Iron Works showed it to me after it was executed and I told him that it was not satisfactory to me, that it was not my understanding and not in accordance with the arrangements with the Holman Company; that the agreement provided that instead of the Union Iron Works paying this money for these materials to the creditors who ought to be protected, it provided that the money should be paid to the Holman Company. I said: "I don't know who this is going to go to. I don't know who is going to make up the losses of the people who furnished material to you for the twenty-three cars and furnished them to the Union Iron Works and gave orders to these people so that they will get the money and the Union Iron Works will get it; because I feel certain obligations to those creditors, that is, those who have furnished material for the twenty-three cars." The old creditors I did not care anything about. It was in relation to this contract. I told him: "I want you to carry out your contract," and he said he would do so. I understand that the Holman Company did furnish to the Union Iron Works a list of such creditors who had furnished it with material, and that the Holman Company did give orders on the Union Iron Works, and that the Union Iron Works refused to pay the Holman Company the amount agreed upon in the agreement, because they had to hold out \$5,000 that had to be provided for in some way. So that had to be reduced to a sufficient extent to provide for that until such time as the contract was completed. Then on the completion of the contract if

(Testimony of Marshall A. Frank.)

there was [13] a profit of \$5,000 that would be available, the creditors would be entitled to the \$5,000. Of course, this only refers to the twenty-three cars.

Mr. ROSENHEIM.—Q. At this conference at the Mayor's office was it understood that the Union Iron Works would pay the creditors for the value of the materials turned over to them for the contract of the 23 cars? A. Yes.

Mr. HUNT.—We object to that as incompetent, irrelevant and immaterial. It is a matter purely between the Holman Company and the Union Iron Works.

The REFEREE.—The objection is overruled. The objection that it is incompetent, irrelevant and immaterial is overruled.

Mr. HUNT.—I will object on the ground that it is asking for a conclusion of the witness as to what took place. I think he should testify as to what was said and done.

The REFEREE.—The latter objection is sustained. The creditors present at the conference wanted to know how they were going to get their money for the material that was furnished to the twenty-three cars, and one man said: "I furnished all material for the twenty-three cars. That has been given to the Holman Company," and Mr. McGregor of the Union Iron Works told him: "We will take over that material and pay for it. It has already been delivered. It will save us the trouble of buying it and waiting for it to be manufactured. It will

(Testimony of Marshall A. Frank.)

facilitate the building of these twenty-three cars."

Q. Then Mr. McGregor said the Union Iron Works would take over the material on hand? A. Yes.

Q. For the construction of the twenty-three (23) cars and the Union Iron Works would pay for it?

A. Yes.

(Witness continuing:) And that conversation was all taken down in shorthand, and there were two (2) reporters [14] present when these conferences occurred. I do not know the names of the reporters who took down the testimony, but it was taken down in the Mayor's office in shorthand; all of these conferences were reported. I think there were always two (2) reporters present taking down the conference. I don't think any statement was made as to how the money would be paid to the Holman Company or to the creditors. I made Mr. Moses of the Holman Company send to the Union Iron Works a list of creditors who had sent their material to the Holman Company and give orders not to pay the money over to anyone else. I remember that the Judson Manufacturing Company and M. Greenberg Sons were among the creditors named in that list.

Testimony of Mountford S. Wilson.

Direct Examination.

At the time the Holman Company had completed about twenty of the forty-three cars it was evident that it would be unable to complete its contract with the city. The city arranged for the Union Iron Works to take over the contract. It was agreed that the Union Iron Works would take directly from the

(Testimony of Mountford S. Wilson.)

various supply houses and pay for it directly, the material that was to be delivered to the Holman Company. The Holman Company also had on hand a large amount of material fabricated and ready to place in the remaining cars, and the Union Iron Works agreed to take this material from the Holman Company and pay the Holman Company for it. Matters proceeded along these lines until on [15] June 30, 1913, there was due from the city to the Union Iron Works \$57,750, but just before we received that payment notices were served on the City Treasurer as follows: "M. Greenberg Sons made a claim of \$1,453.02. This amount the City Treasurer retained and also the sum of \$75.00, which he deducted from the amount due the Union Iron Works on account of costs. The Judson Manufacturing Company claimed \$2,079.80, and the Treasurer retained \$75.00 for costs. These transactions were on April 30, 1913, and these amounts were retained by the Treasurer, the total being \$4,567.54, including the costs in each case. When the Union Iron Works settled with the Holman Company for the amount which was due from the Union Iron Works to the Holman Company for the material which had been received from the Holman Company, they deducted from the amount due the Holman Company the sum of \$4,567.54, the sum retained by the city. The Union Iron Works makes a claim for this money only in the contingency that there shall be any question as to its right to deduct the \$4,567.54 in its settlement with the Holman Company. The Union Iron Works

(Testimony of Mountford S. Wilson.)

does not know that these various people that put in these stop claims furnished anything. These various supplies represented by these stop notices which were served upon the City Treasurer were materials delivered by the Holman Company to the Union Iron Works.

Cross-examination.

The Union Iron Works had entered into this contract to finish the twenty-three cars. The Holman Company stated that they had a lot of material fabricated and cut to proper shape and form for installation in these cars, and asked the Union Iron Works if they would not take that material off their hands and the Union Iron Works said they would take it off their hands, and they did. The Union Iron Works agreed to pay [16] the proper value for that material. There has been a settlement between the Union Iron Works and the Holman Company as to what the proper value was. There was a settlement when this \$4,567.50 was deducted. The Union Iron Works has no claim on this \$4,567.50 except in the event that there should be any question as to the transaction whereby the Union Iron Works deducted that amount from their account that was owing to the Holman Company for supplies. The Union Iron Works never agreed that any of the creditors should furnish the material to the Holman Company which it took over. The Union Iron Works never promised to pay any of these firms who furnished the material turned over to the Union Iron Works by the Holman Company.

(Testimony of Mountford S. Wilson.)

Redirect Examination.

I was present in the Mayor's office when the conversations took place regarding the payment for this material which was turned over to the Union Iron Works by the Holman Company. The general understanding was at the time that as to the material that had not yet been delivered by the various supply companies to the Holman Company the Union Iron Works would take that material.

Testimony of John A. McGregor.

Direct Examination.

I am the President of the Union Iron Works. In connection with this material which was on hand at the Holman Company's plant and which we could use in the construction of these cars, the Holman Company asked us if we would not take that material over at cost, plus, in the case of where it had been fabricated, the value of the labor that had been put upon it, and we said we would, and did. In this agreement it was recited that we would pay the Holman Company the agreed upon value for all of this [17] material. Subsequently, and while the cars were in the progress of construction, the Holman Company asked us if we would not assist them in paying some of their creditors, that instead of paying the amount to the Holman Company would we be good enough to pay certain creditors upon their order and deduct the amount so paid from the amount due by the Union Iron Works to the Holman Company, and we said we would be glad to oblige

(Testimony of John A. McGregor.)

them in it so far as we could, and in a number of cases we paid the creditors upon the order of the Holman Company. We recognized these orders as a payment to the Holman Company for what we owed them and deducted them from the amount we owed them. I know that the Holman Company was indebted to these creditors because a list of them had been furnished to me by Mr. Holman himself. I attended numerous conferences at the Mayor's office in reference to this matter. As a result of these conferences this agreement with the Holman Company, which is known as Trustee's Exhibit No. 7, was executed. The payments made by the Union Iron Works to creditors who presented orders were not the result of any of these conferences but were a later matter. After we had gotten the contract and taken this material from the Holman Company, Mr. Holman brought this list of creditors and stated that the creditors were oppressing him for payment and wanted to know if we would recognize orders instructing us to pay certain moneys to some of these creditors, and I said that I would be glad to accommodate them so far as I could. This was after we had executed the contract to construct these cars. I told Mr. Holman that we would not recognize any liability to these creditors, not knowing what the cars were going to cost us and how much money we would have to pay back to the Holman Company, but that if it later developed that we could instead of paying the money to the Holman Company pay it to the creditors, we would be glad [18] to do so. We

(Testimony of John A. McGregor.)

may have paid four or five thousand dollars under these orders. There was no agreement whatever that if there were money enough to pay these claims we would pay them. We offered to pay some of the claims if 10% were deducted. At that time we had received no money for the construction of the cars. We did not know if we would receive it for some time and we were under no obligation to pay either the Holman Company or recognize any order, but if the creditors would make it an object to us, we would see if we could raise the money for them and pay them less 10 or 5 per cent. We offered this to them generally as they presented themselves.

Cross-examination.

Mr. Holman showed me a list of creditors and said that if there was enough money to come from the city so that we could safely do so, we should pay the creditors upon their presenting an order. In every case checks were drawn to the Holman Company and not to any creditor that we paid. We never made any agreement to pay each or any creditor. I offered to pay them in some cases after taking off a deduction of 5 or 10 per cent. I offered to do that to Greenberg's Sons and it may have been offered to Judson Manufacturing Company. We did not offer to pay any of the old creditors of the Holman Company. Mr. Holman brought down a list of creditors which he himself had segregated into two parallel columns. Take, for instance, one of the creditors in the sum of \$250.00. Now, he said, for instance, that \$125.00 of

(Testimony of John A. McGregor.)

that amount was represented by an indebtedness for materials incurred in the construction of the first twenty cars, or an old claim, and that the other \$125.00, in his judgment, was represented by material which they had supplied for the construction of the twenty-three cars. I said that we had no money for the payment of any claims nor for the payment of [19] material that we had bought from the Holman Company. That when we got money from the city we would be glad to turn it over to the Holman Company, but if they wanted to make a deal with us we would pay them on Holman's order but would expect some consideration for advancing them the money. The Union Iron Works took over certain materials in the possession of the Holman Company, which materials were to be used in the construction of the twenty-three cars by the Union Iron Works. The Union Iron Works was to pay the Holman Company for that material, and it was not understood that the amount should go to the people who furnished those materials. The Union Iron Works did not subsequently agree to pay the money direct to the creditors who had furnished these materials.

Testimony of M. S. Greenberg.

Direct Examination.

I am in the brass foundry business. My firm's name is M. Greenberg's Sons. We had been doing business with the Holman Company for years, and after the railroad proposition Mr. Riess came and told us that he would want some material. I asked

(Testimony of M. S. Greenberg.)

him how about getting our money, and he said, "That will be all right; we have assigned all the moneys to the Casualty Company and they will pay you." So we furnished the material. That was for the first twenty cars. Then this order of delivery for the second twenty-three cars came, and Mr. Riess told me that the material for the second twenty-three cars was turned over to the Union Iron Works and they had agreed that they would take care of the creditors, and see that the material was paid for; that they would take it over, and that they would accept orders. That is what Mr. Riess told me was agreed to in the Mayor's office. The Holman Company then issued an order [20] on the Union Iron Works for 70% of the material furnished on the twenty-three cars, 30% being held up in consideration of the \$5,000 for the shed and other possible losses. We presented our order for the 70%, but Mr. McGregor told us he was under no obligation to us and he did not promise to pay, but said he would pay us if we took off 10%. We furnished \$1,453.02 worth of materials to the Holman Company that was turned over to the Union Iron Works and we received an order for 70% on that and also a letter which said: "Enclosed you will find an order for 70% and the 30% order will follow later." Of course, it never followed. This was all furnished for the construction of the second twenty-three cars. It was clearly understood that it was to be turned over to the Union Iron Works and that the Union Iron Works would

(Testimony of M. S. Greenberg.)

pay us directly. I cannot say definitely whether this material was turned over to the Union Iron Works or to the Holman Company.

Testimony of John D. Osborne.

Direct Examination.

I am the secretary of the Judson Manufacturing Company. The Holman Company owed us money when they entered into this contract to build these cars for the city, and I gave them credit for a lot of materials which were delivered to them to be incorporated in the construction of the cars. We were to have a share of the moneys that were to be due from the city at certain times as the construction of the cars progressed or as the cars were delivered. We were to be paid by the Casualty Company. When the Holman Company would deliver two or four cars the city was prepared to pay for them and would pay the money to the Casualty Company for distribution to us and to some others who had been furnishing materials. I [21] simply know these matters second-hand as an officer of the Judson Manufacturing Company. A committee was formed of the creditors and they made some sort of an arrangement with the Casualty Company to get the payment for the cars, that certain moneys were to be set aside by the city which the Casualty Company could collect and distribute, because the Casualty Company had agreed to take care of the creditors for materials supplied for the cars.

(Testimony of John D. Osborne.)

Cross-examination.

There was not to my knowledge any agreement between the Judson Manufacturing Company and the Union Iron Works regarding the payment of this money. [22]

**Notes Taken at a Meeting Held in the Mayor's Office,
City Hall, December 11, 1912, Re Geary Street
Cars Contract.**

The MAYOR.—Will you protect the Union Iron Works, Mr. Frank, on a subcontract, and let this matter of possible loss wait until they are through? I think that Mr. Frank and the Surety Company have given a bond to protect the city, and I think it is up to Mr. Frank to say: "We will step into this thing and help the city; we stand on our bond."

Mr. FRANK.—You are right; we stand on our bond.

The MAYOR.—I think you ought to step in, in the interest of the whole situation, and say: "Our position will be the same under this—"

Mr. FRANK.—It won't be the same.

The MAYOR.—It would if you make it so.

Mr. FRANK.—It would not be just to the stockholders. They are protected to-day, and you ask me to take away their protection. The city has \$70,000 with the Holman Company. Now, we make this new arrangement and you pay out the money and there is nothing to protect us. The city has property now; will continue to receive property from the Holman Company. We must at least retain 25 per cent of

the value of that property. You can figure out what the possibility of the amount of damages the city could recover. We cannot do any more than our contract calls for. Our hands are tied by the limits of the contract. We have a power of attorney to do so much. Our power of attorney says we can go so far and no further. I am simply the representative of a number of stockholders, and my place is to protect them and not to give away any of their money, or to assume obligations to put them into [23] a position different from the one they are in at the present time, because it is going to be a benefit to the city.

The MAYOR.—You should protect the city on your bond.

Mr. FRANK.—In an attempt to give you the cars I don't want to alter the position of the stockholders of the Surety Company. That is, make them no worse off than they are at the present time.

The MAYOR.—The whole proposition is this: Mr. Moses will assign twenty-three cars of his contract to the Union Iron Works, which the Union Iron Works will build and guarantee to have ready for delivery to the city by the first of March. Mr. Moses will continue the building of his ten cars and Mr. Frank agrees to the assignment. The bond stands for the protection of the city right through to the end. We look to the Holman Company and the Surety Company, as we are doing at the present time.

Mr. FRANK.—We will recognize that assignment.

The MAYOR.—Is that all satisfactory, Mr. McGregor?

Mr. MCGREGOR.—Yes.

The MAYOR.—Then, when we get through, we will take up the question of whatever the city's loss or damage is with the Holman Company and you, Mr. Frank. I am very glad to have it all settled and fixed up in this way. The Holman Company will make an assignment. In other words, the city will recognize the assignment of the Holman Company on the payments to be made to the Union Iron Works, and the payment will be made to the Union Iron Works according to the contract directly from the city to the Union Iron Works.

Mr. MOSES.—This is contingent upon the fact that there will be no objection by any of the creditors on the twenty-three cars that we deliver to the Union Iron Works, that they pay the creditors. I suppose the creditors will have no objection [24] to the Union Iron Works having the account.

The MAYOR.—It is understood that the Union Iron Works take the position of the Holman Company. I suppose Mr. McGregor will pay for all the material he uses in these cars.

Mr. MOSES.—We pay the material people direct out of their twenty-three cars. You see we have a carload of material from the eastern people that we will deliver to the Union Iron Works. They take the entire materials for the twenty-three cars and pay the creditors for the twenty-three cars.

The MAYOR.—They will take the material and pay the creditors for material that they use. The

Union Iron Works agree to that.

Mr. MOSES.—The Union Iron Works agree to which?

The MAYOR.—Have you any doubt?

Mr. MOSES.—No; but I think the creditors should be notified to that effect.

The MAYOR.—You will find the Union Iron Works ready to take care of any of these payments that fall due on any of the material they use, and you will not have any responsibility there.

Mr. McGREGOR.—I cannot see any difficulty.

The MAYOR.—Mr. Frank has been able to stand in here and help out this thing, so that whatever our losses are we will look to you or Mr. Frank at the end. [25]

Trustee's Exhibit No. 1 [Bond, W. L. Holman Co. et al.—City and County of San Francisco].

KNOW ALL MEN BY THESE PRESENTS: That we W. L. HOLMAN COMPANY (a corporation), as principal and Pacific Coast Casualty Company, a California corporation, authorized to do a general surety business, as surety, are held and firmly bound unto the CITY AND COUNTY OF SAN FRANCISCO, in the just and full sum of Fifty Thousand (\$50,000) Dollars, lawful money of the United States of America, for the payment whereof well and truly to be made, we hereby bond ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Given under our hands and sealed with out seals, this 11th day of June, A. D. 1912.

NOW, the condition of the foregoing obligation is such, that whereas, the above bounden W. L. Holman Company (a corporation) has entered into a contract, of even date herewith, with the Board of Public Works of the City and County of San Francisco, as such Board, and not otherwise, to do and perform in the said City and County the following work, to wit:

Forty-three (43) double end, pay-as-you-enter, California type motor cars, complete.

Four (4) extra trucks complete with axles, wheels and motors.

For the Geary Street Municipal Railway.
as will more fully appear from said contract (executed in triplicate), reference to which is hereby made.

NOW, THEREFORE, if the above bounden W. L. Holman Company (a corporation) shall well and truly perform, or cause to be performed, every and all of the requirements of said contract, as in the said contract set forth, then this obligation to be null and void, otherwise to remain in full force and effect.
[26] This bond is given in conjunction with and in addition to a bond of like amount, of even date herewith, covering the same contract.

W. L. HOLMAN COMPANY,

By J. W. REISS,

Vice-President.

PACIFIC COAST CASUALTY COMPANY,

By JOY LICHETNSTEIN,

Secretary.

(Contract.)

GEARY STREET RAILWAY CONSTRUCTION.
BOND ISSUE, 1910, CONTRACT No. 11
RESOLUTION OF AWARD NO. 17729.

(Second Series)

THIS AGREEMENT, made this 11th day of June, A. D. 1912, by and between W. L. Holman Company (a corporation) of the City and County of San Francisco, State of California, the party of the first part, and the BOARD OF PUBLIC WORKS OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, under and by virtue of the authority granted to it as such by Article VI of the Charter of said City and County, approved January 19th, 1899, the party of the second part, acting for and in behalf of said City and County.

WHEREAS, the said party of the first part, as will more fully appear by reference to the record of the proceedings of the Board of Public Works of said City and County, on the 20th day of May, A. D. 1912, has been awarded the contract for the work hereinafter mentioned:

NOW, THEREFORE, THESE PRESENTS WITNESSETH, That the said party of the first part, for and in consideration of the premises aforesaid, and the consideration hereinafter mentioned, promises and agrees with the said Board of Public Works, as such and not otherwise, that it will under the direction and to the satisfaction of the said Board of Public Works furnish and deliver to the said [27] City and County of San Francisco the following articles ordered by the Board of Supervisors of

said City and County, to be purchased for the Geary Street Municipal Railway, to wit: Forty Three (43) double end, pay-as-you-enter, California type motor cars, complete. Four (4) extra trucks complete with axles, wheels and motors. Said articles to be built and furnished in accordance with the plans and specifications hereunto annexed and which are hereby made a part of this contract, and the delivery of the same to be completed within one hundred and eighty (180) calendar days from the date of this contract, as specified in the notice inviting proposals therefor.

And the said Board of Public Works, in behalf of the City and County of San Francisco promises and agrees that upon the performance and fulfillment of the covenants aforesaid the said City and County will pay or cause to be paid, in the manner provided by law, to said party of the first part, for the articles aforesaid, the following prices, to wit:

Proposition "A" For furnishing and delivering double end, "Pay-as-you-enter," "California" type semi-steel motor cars complete, in accordance with the specifications. The sum of seven thousand seven hundred dollars (\$7700.00) each. For furnishing and delivering extra trucks complete with axles, wheels and motors, in accordance with the provisions of the specifications. The sum of one thousand five hundred dollars (\$1500.00) each. Progressive payments for said articles completed and ready for delivery will be made within the meaning and intent of the provisions therefor in the specifications.

Time is of the essence of this contract in all things.

It is hereby stipulated that the said party of the first part shall forfeit, as a penalty, to the said City and County of San Francisco, ten (10) dollars for each laborer, workman, or mechanic employed in the execution of this contract, by the [28] said party of the first part or by any subcontractor under said party of the first part, upon the work in this contract specified, for each calendar day during which such laborer, workman, or mechanic, is required or permitted to labor more than eight hours in violation of the provisions of an act of the Legislature of the State of California entitled "An Act limiting the hours of service of laborers, workman, and mechanics employed upon the public works of, or work done for, the State of California, or of, or for any political subdivision thereof; imposing penalties for violation of the provision of said act, and providing for the enforcement thereof," approved March 10, 1903, and of Section 653c, Penal Code of California, so far as such statutes may be applicable.

And it is further understood and agreed by and between the parties of the first and second part hereto, that this contract is entered into in compliance with, and subject to, the conditions imposed by Section 1, Chapter III, Article II, of the Charter of the City and County of San Francisco, providing that in the performance of this contract eight (8) hours shall be the maximum hours of labor on any calendar day, and that the minimum wages of laborers employed by the contractor in the execution of this contract shall be three (3) dollars a day so far as the same may be applicable. Also it is agreed

and understood by the parties to this agreement, that in no case, except where it is otherwise provided in said Charter, will the said City and County, or any department or officer thereof, be liable for any expense of the articles aforesaid.

IN WITNESS WHEREOF, The parties to these presents have hereunto set their hands and seals, and have executed this contract in triplicate, the day and year first above written.

W. L. HOLMAN COMPANY, (Seal)

By J. W. REISS, (Seal)

Vice-President,

MICHAEL CASEY, (Seal)

DANIEL G. FRASER, (Seal)

C. S. LAUMEISTER, (Seal)

Commissisoners, Board of Public Works of the City
and County of San Francisco.

Signed, sealed and delivered in the presence of
RICHARD J. CLINE. [29]

**Trustee's Exhibit No. 2 [Agreement, Dated June 11,
1912, W. L. Holman Co.—Pacific Coast Casualty
Co.].**

This Agreement made this 11th day of June, 1912, by and between W. L. HOLMAN COMPANY, a Corporation (The Principal), and PACIFIC COAST CASUALTY COMPANY, a corporation (The Surety), Witnesseth:

FOR AND IN CONSIDERATION of the Surety executing a certain bond on behalf of the Principal in favor of the City and County of San Francisco upon a contract to construct certain street cars, the

said Principal hereby appoints the Surety its Attorney in Fact and empowers it to sign in its name all demands in its favor for payments to be hereafter made by the City and County of San Francisco in connection with said contract and to receipt for and secure all such demands when payable from the Auditor of the said City and County.

The Principal further agrees that said demands are to be deposited in the Merchants National Bank and an account opened in said bank designated "W. L. HOLMAN CO., SPECIAL," into which all moneys received from the said City and County on said contract shall be paid and not withdrawn therefrom except by countersignature of the Surety or its designated representative upon the presentation of proper claim against said account incurred in connection with the performance of said contract, and after the full performance of said contract, (maintenance claims not to be considered), and the satisfaction of all claims against the Principal arising from said contract, the balance, if any, remaining in said account, to be paid to the Principal.

The Surety hereby agrees to execute the above bond and to turn said demands as received over to said Bank, the money collected therefrom to be deposited in said account, subject to the terms and conditions hereof. [30]

IN TESTIMONY WHEREOF, W. L. HOLMAN COMPANY and PACIFIC COAST CASUALTY COMPANY have caused these presents to be executed and their official seals attached by their duly

authorized officers on the day and year first herein-
above written.

W. L. HOLMAN COMPANY,
By (Signed) J. W. REISS,
Vice-President.

PACIFIC COAST CASUALTY COMPANY,
By JOY LICHTENSTEIN,
Secretary.

Accepted as to conditions governing account.

MERCHANTS' NATIONAL BANK,
By —————. [31]

**Trustee's Exhibit No. 3 [Agreement, Dated June 11,
1912, W. L. Holman Co.—Pacific Coast Casualty
Co.].**

THIS AGREEMENT, made this 11th day of June,
1912, by and between W. L. HOLMAN COMPANY,
a Corporation (the Principal), and PACIFIC
COAST CASUALTY COMPANY, a Corporation
(Surety), Witnesseth:

FOR AND IN CONSIDERATION of the Surety
executing a certain bond on behalf of the Principal
in favor of the City and County of San Francisco
upon a contract to construct certain street cars, the
said Principal hereby appoints the Surety its Attor-
ney in Fact and empowers it to sign in its name all
demands in its favor for payments to be hereafter
made by the City and County of San Francisco in
connection with said contract and to receipt for and
secure all such demands, when payable, from the
Auditor of the said City and County.

IN TESTIMONY WHEREOF, W. L. HOLMAN
COMPANY and PACIFIC COAST CASUALTY

COMPANY have caused these presents to be executed and their official seals attached by their duly authorized officers on the day and year first hereinabove written.

W. L. HOLMAN COMPANY,

By (Signed) J. W. RIESS.

PACIFIC COAST CASUALTY COMPANY,

By _____. [32]

Trustee's Exhibit No. 7 [Agreement, Dated December 17, 1912, W. L. Holman Co.—Union Iron Works Co.].

THIS AGREEMENT AND INDENTURE made and entered into this 17th day of December, 1912, by and between W. L. HOLMAN COMPANY, a corporation, party of the first part, and UNION IRON WORKS COMPANY, a corporation, party of the second part, WITNESSETH:

WHEREAS, W. L. HOLMAN COMPANY, the party of the first part hereto, did on the 11th day of June, 1912, enter into a certain contract with the Board of Public Works of the City and County of San Francisco, State of California, acting for and in behalf of the said City and County, which said contract provides, among other things, for furnishing and delivering to said City and County of San Francisco forty-three (43) double-end, pay-as-you-enter, California type motor cars, complete; said cars to be built and furnished in accordance with the plans and specifications attached to said contract, said contract and plans and specifications being hereby referred to and made part hereof.

AND WHEREAS said party of the first part has finished and delivered to said City and County Ten of said cars and is desirous of assigning to said Union Iron Works Company so much of its said contract as applies to the building and furnishing of twenty-three of the thirty-three cars not yet built.

AND WHEREAS said party of the first part has on hand certain materials bought and manufactured for installation in said cars;

AND WHEREAS said party of the first part hereto had ordered certain materials and apparatus for said twenty-three cars from the Westinghouse Electric Company and from the J. G. Brill Company, which materials and apparatus said two companies have not yet delivered to said party of the first part:

NOW, THEREFORE, in consideration of the premises and of the sum of One (\$1.00) Dollars each to the other in hand paid, the [33] receipt whereof is hereby acknowledged, the W. L. Holman Company, the party of the first part, does by these presents assign, transfer and set over to said Union Iron Works Company, the party of the second part, so much of said contract as applies to the building of twenty-three of said thirty-three cars not yet built and delivered and all of the rights to build and furnish to said City and County twenty-three of said cars, together with the right to collect and receive direct from said City and County the full sum of Seven Thousand Seven Hundred (\$7,700) Dollars for each of said twenty-three cars; and does hereby agree to sell and deliver to the said party of the second part, and the said party of the second part

does hereby agree to purchase and receive, all materials which the party of the first part now has on hand, at and for the following rates: All materials manufactured by others for twenty-three cars, at the exact invoice price for such manufactured materials, plus freight and drayage, f. o. b. shops of the party of the first part at 18th and Indiana Streets, San Francisco; as to all raw materials for the twenty-three cars, the invoice cost, plus freight and drayage f. o. b. shops of the party of the first part at 18th and Indiana Streets, San Francisco; as to all materials manufactured by the party of the first part for the twenty-three cars, invoice cost of the raw materials therefor, plus freight and drayage, f. o. b. said shops, together with such sum representing the cost of manufacturing the same as may be found to be fair and reasonable and necessarily incurred for the same.

AND said party of the first part does hereby assign, transfer and set over to said Union Iron Works Company all rights it has or may have to purchase and receive from said Westinghouse Electric Company and said J. G. Brill Company the said materials and apparatus above referred to as ordered from said Westinghouse Electric Company and said J. G. Brill Company. [34]

AND said Union Iron Work Company does hereby accept said assignment of so much of said contract as applies to twenty-three of said thirty-three cars not yet built and delivered to said City and County and the right to build and furnish to said City and County said twenty-three cars, together with the

right to collect and receive direct from said City and County the full sum of Seven Thousand Seven Hundred (\$7,700) dollars for each of said twenty-three cars; and said Union Iron Works Company agrees to purchase from said Westinghouse Electric Company and said J. G. Brill Company so much of the materials and apparatus which have been so ordered from said Companies for said twenty-three cars at the price agreed to be paid for the same by said party of the first part.

IT IS specially covenanted, agreed and understood, however, anything to the contrary in any wise herein contained notwithstanding, and whether this contract shall be partly executed or not, that this contract shall not be binding upon either party hereto and shall be of no further force or effect whatever unless said Board of Public Works, or the Board of Supervisors, acting for said City and County of San Francisco, shall ratify and approve of this assignment by said W. L. Holman Company to Union Iron Works of so much of said contract of June 11th, 1912, as will entitle said Union Iron Works Company to build and furnish said twenty-three cars, said ratification and approval to be in such form that said City and County will accept said Union Iron Works Company in the place and stead of said W. L. Holman Company in so far as said twenty-three cars are concerned and extend the time for completion of the same until March 1st, 1913, and without any penalty or forfeiture of any kind against said Union Iron Works Company unless it shall fail to deliver said twenty-three cars to said City and County on or

before the 1st day of March, 1913. [35]

AND said W. L. Holman Company does hereby specially covenant and agree that it will protect and save harmless said Union Iron Works Company of and from all damages and claims for damages, or penalties or forfeiture or losses of any and all kinds by reason of its, said W. L. Holman Company's failure to deliver thirty-three of said forty-three cars described in said contract of June 11th, 1913, to said City and County of San Francisco within the time stipulated therein.

IN WITNESS WHEREOF the parties hereto have caused their respective names and seals to be hereto signed and affixed by their respective officers thereunto duly authorized, the day and year first above written.

W. L. HOLMAN COMPANY,

By J. W. RIESS,

President.

[Seal]

By MARCUS MOSES,

Secretary.

UNION IRON WORKS COMPANY,

By JOHN A. MCGREGOR,

President.

[Seal]

By ARNOLD FOSTER,

Secretary.

It is hereby stipulated and agreed that the foregoing is a true and correct statement of the evidence in the above entitled matter.

Dated, June 30, 1914.

SAMUEL ROSENHEIM,
Attorney for Judson Manufacturing Co. and M.
Greenberg's Sons.

HENRY G. W. DINKELSPIEL,
J. M. THOMAS,
REUBEN G. HUNT,
Attorneys for H. Van Luven, Trustee in Bankruptcy.

The foregoing statement of evidence is hereby approved this 30th day of June, 1914.

M. T. DOOLING,
District Judge. [36]

[Endorsed]: Filed Jun. 30, 1914, at 5 o'clock and
—— min. P. M. W. B. Maling, Clerk. By C. W.
Calbreath, Deputy Clerk. [37]

(Title of Court and Cause.)

**Order of Referee on Treasurer of San Francisco to
Pay Money to Trustee.**

H. Van Luven, the duly appointed, qualified and acting trustee of the estate of the above-named bankrupt, having filed herein on the 11th day of July, 1913, his duly verified petition praying that the undersigned referee issue an order directing the Auditor of the City and County of San Francisco, State of California, a municipal corporation, to appear before the said referee and show cause, if any there be, why he should not pay over to the said trustee the sum of \$5,367.54, moneys [38] alleged by the said trustee, in the said petition, to belong to the estate of the Bankrupt but to be in the possession, or

under the control of, the said Auditor.

And the said Auditor having filed herein his affidavit showing that the said money was not in his possession but was in the possession of the Treasurer of said municipal corporation and that the hereinafter named persons claimed the title to the same, in the amounts hereinafter set forth:

- (1) Judson Manufacturing Co.....\$2154.80
- (2) General Railway Supply Co...\$ 884.72
- (3) M. Greenberg's Sons.....\$1528.02
- (4) Taylor & Spottswood and C. H.
Evans Co.....\$ 800.00

And the undersigned referee having thereafter issued orders herein directing the said persons, and the said Treasurer, to appear before the said referee and show cause, if any there be, why the said moneys should not be paid over to the said trustee, as prayed for in the said petition, and the said Treasurer and the said persons, to wit, Judson Manufacturing Co., General Railway Supply Company, M. Greenberg's Sons, Taylor & Spottswood and C. H. Evans Co., having appeared before the said referee at the time and place specified in the said order to show cause and expressly consented to the jurisdiction of the undersigned referee to determine the said controversy.

And the said Treasurer and the said General Railway Supply Company having expressly disclaimed, in open court, any interest in the said fund, and the said Judson Manufacturing Company, M. Greenberg's Sons, Taylor & Spottswood and C. H. Evans Co., having orally petitioned the said referee that the said fund be directed paid to them in the amounts

hereinabove set forth, as against the trustee in bankruptcy.

And it appearing to the referee that of the said fund of \$5367.54 the trustee has no right, title or interest in the [39] said sum of \$800 claimed by Taylor & Spottswood and C. H. Evans Co., and a hearing having been had before the said referee as to the title to the balance of the said fund, to wit, the sum of \$3682.82, as between the said trustee in Bankruptcy and the said Judson Manufacturing Co., and M. Greenberg's Sons, and evidence both oral and documentary, having been offered and received upon the said controversy.

And it appearing to the referee that the said Judson Manufacturing Company and the said M. Greenberg's Sons have no right, title or interest in the said balance of said fund, to wit, the said sum of \$3682.82, and that the said sum of \$3682.82 and said sum of \$884.72 alleged to have been claimed by Gen. Ry. Supply Co., belong to the estate of the Bankrupt and should be turned over by the said Treasurer to the trustee in bankruptcy, as a part of such estate.

And the said referee being fully advised in the law and premises and the said controversy having been finally submitted to the said referee for decision.

IT IS HEREBY ORDERED that the petition of the said Judson Manufacturing Company and the said M. Greenberg's Sons be and the same is hereby denied, and that they, and each of them, have no right, title or interest in the said sum of \$3682.82; and

IT IS HEREBY FURTHER ORDERED that said Treasurer of the City and County of San Fran-

cisco, State of California, a municipal corporation, be and he is hereby directed forthwith to pay over to the trustee in bankruptcy herein, the said sum of \$3682.82, and the said sum of \$884.72 so disclaimed by the said General Railway Supply Company; and

IT IS HEREBY FURTHER ORDERED that the said order to show cause as to the said Taylor & Spottswood and C. H. Evans Co. be and the same is hereby dismissed.

Done in open court, this 22nd day of December, 1913.

ARMAND B. KREFT,

Referee. [40]

[Endorsed]: Filed Dec. 31, 1913. 11 A. M. A. B. Kreft, Referee. [41]

(Title of the Court and Cause.)

Petition for Review of the Order of Referee.

To A. B. Kreft, Esq., Referee in Bankruptcy:

Your petitioners respectfully show:

That your petitioners, JUDSON MANUFACTURING COMPANY and M. GREENBERG SONS, are creditors of the above-named bankrupt, and that they have filed their claims in said matter;

That on the 22nd day of December, 1913, an order, a copy of which is hereto annexed and made a part hereof, was made and entered herein by the Referee.

That such order was and is erroneous in,

1. That said Referee erred in finding that the Trustee in the above-entitled proceeding was entitled to receive the moneys in the hands of the Treasurer

of the City and County of San Francisco, as against your petitioners, to the extent of the respective claims of said petitioners;

2. That said Referee erred in finding that your petitioners were not entitled to receive and be paid out of said moneys in the hands of said Treasurer, the amount of their respective claims involved in this particular proceeding;

3. That said Referee erred as a matter of law in holding and ordering that the moneys in the hands of the Treasurer of said City and County of San Francisco should be paid to said Trustee;

4. That said Referee further erred as a matter of law in holding and ordering that your petitioners were not entitled to receive and be paid the amount of their said respective claims out of the said moneys now in the hands of [42] the said Treasurer of the City and County of San Francisco;

WHEREFORE, your petitioners feeling aggrieved because of the said order, pray that the same may be reviewed as provided in the Bankruptcy Law of 1898 and General Order XXVII, so far as said order authorized the payment to said trustee out of said funds an amount sufficient to cover the amount of the respective claims of your petitioners, and also in holding that your petitioners were not entitled to receive and be paid out of said funds a

sum sufficient to cover their respective claims.

JUDSON MANUFACTURING COMPANY,

By J. D. OSBORNE,

Secretary.

M. GREENBERG'S SONS,

By MAURICE S. GREENBERG,

Of the Firm.

(Duly verified.) [43]

(Notice of Decision dated December 23, 1913, and order of referee, A. B. Kreft, dated December 22, 1913, contained in the original of this document as filed in this office, are omitted from this transcript as per "Stipulation for Diminution of Record," copy of which is included in this Transcript.)

[Endorsed]: Filed Jany. 9, 1913, 2 P. M. A. B. Kreft, Referee. [44]

(Title of Court and Cause.)

Certificate of Referee on Review.

To the Honorable MAURICE T. DOOLING, Judge
of the District Court of the United States in and
for the Northern District of California.

The undersigned, referee, to whom was referred the above-entitled matter respectfully certifies and reports:

That on the 22d day of December, 1913, I made an order directing the treasurer of the City and County of San Francisco to pay certain moneys to the trustee. The Judson Manufacturing Company and M. Greenberg's Sons, creditors of the bankrupt, feeling aggrieved thereat, on January 9, 1914, within the

time granted by the referee, filed a petition to review said order.

The question presented on this review concerns the right of said creditors to the sum of \$3,682.82 in the hands of the treasurer of the City and County of San Francisco, and which money the trustee claims should be paid to the estate of bankrupt as a sum due the bankrupt from the Union Iron Works, arising out of materials furnished to the Union Iron Works for the construction of street-cars.

The claims of these creditors were partially heard in connection with the petition in intervention of C. F. Bulotti and H. R. Noack. The rights of the creditors in both matters depend upon the same contracts, and understandings had between the bankrupt, the Pacific Coast Casualty Company, and the creditors who furnished labor and materials for the construction of the street-cars.

As a consideration of the evidence and the reasons upon which my conclusions are based are stated in my certificate upon [45] petition to review, taken by said C. F. Bulotti and H. R. Noack, which is transmitted to the Court at the same time as this certificate, it is only necessary to state certain additional facts concerning the claims of the creditors taking this review.

The bankrupt, being unable to complete its contract with the city within the time specified, the construction of twenty-three of the street-cars was turned over to the Union Iron Works Company. At that time the bankrupt had on hand certain materials which had been sold and delivered to it by

Judson Manufacturing Company and M. Greenberg Sons, and which it had intended to use itself in the construction of these cars. The bankrupt turned these materials over to the Union Iron Works, which agreed to pay the bankrupt for them and then proceeded to use them in the construction of these cars.

Prior to the final payment by the city to the Union Iron Works for the construction of these cars, the Judson Manufacturing Company and M. Greenberg Sons filed with the city stop notices in the respective amounts of \$2,154.80 and \$1,528.02, the same being the amounts of their claims against the bankrupt for these materials. The city treasurer deducted the sum of \$3,682.82 from the amount due the Union Iron Works Company and retained the same sum to cover these stop notices.

The Union Iron Works Company made a settlement with the trustee in bankruptcy in respect to the materials turned over to it by the bankrupt, and in this settlement the Union Iron Works Company was credited with this sum of \$3,682.82 and on its part surrendered to the trustee its interest in this sum.

The trustee in bankruptcy caused orders to be issued against the said city treasurer, Judson Manufacturing Company and M. Greenberg Sons, directing them to appear before the referee and show cause why this sum of \$3,682.82 should not be turned over to the trustee in bankruptcy as a part of the [46] estate of the bankrupt. These parties all appeared before the referee in response to these orders expressly consented to the jurisdiction of the

referee to determine the title to this fund of \$3,682.82 and to whom it should be paid. The city treasurer took the position that he was a mere stakeholder, while Judson Manufacturing Company and M. Greenberg Sons claimed title to the fund in the amounts above specified and prayed that it be directed paid to them in said amounts. Counsel for the city, however, stated that the city desired, before submitting to the jurisdiction of the referee, that all claimants who had filed with the city notices to withhold, should also appear before the referee and consent to his jurisdiction. Without the consent of the city and the claimants the referee would have no jurisdiction over this matter. However, all parties have appeared and expressly consented to the jurisdiction of the referee.

The position of these creditors is that all moneys coming from the city are subject to the agreements between the Pacific Coast Casualty Company and the bankrupt and the understandings had between said parties and the creditors furnishing labor and materials for the cars. The agreements between the Pacific Coast Casualty Company and the bankrupt provide that all moneys due to the bankrupt from the city shall be collected by the surety and deposited in the Merchants' National Bank to the account of W. L. Holman, Special, and not to be withdrawn therefrom except by counter-signature of the surety upon claims incurred in connection with the performance of the contract with the city, and that the fact that this sum of \$3,682.82 represents a payment from the Union Iron Works Company to the bank-

rupt for materials furnished by these creditors to the bankrupt, and turned over by the bankrupt to the Union Works, does not affect the right of these creditors to have this money applied to the payment of their claims. [47]

If an equitable assignment of the moneys to come from the city was made by the bankrupt to these creditors in the amounts of their respective claims, I would agree with counsel, that the rights of these creditors were not affected by the transfer of the property to the Union Iron Works.

For the reasons stated in my certificate on the petition to review, taken by C. F. Bulotti and H. R. Noack, I find that no such assignment was made. And the petition of these creditors that said sum of money in the amounts respectively due them be turned over to them, in my opinion, should be denied.

A transcript of the testimony and proceedings taken upon the hearing, together with the exhibits, are transmitted herewith. There was also put in evidence by stipulation of the parties a transcript of the proceedings had in the Mayor's Office upon the consideration leading up to the construction by the Union Iron Works of the twenty-three cars, which transcript of proceedings is transmitted herewith.

Respectfully submitted.

ARMAND B. KREFT,
Referee.

San Francisco, January 14, 1914.

[Endorsed]: Filed Jan. 16 1914, at 4:30 P. M.
W. B. Maling, Clerk. By Lyle S. Morris, Deputy
Clerk. [48]

(Title of Court and Cause.)

**Opinion and Order Reversing the Order of the
Referee.**

This matter comes on on the petition of C. F. Bulotti and H. R. Noak, and the petition of Judson Manufacturing Company and M. Greenberg's Sons, to review certain orders of the referee herein.

The questions involved have to do with certain moneys due from the City and County of San Francisco for the construction of certain cars by the bankrupt. The press of business and lack of time prevents me from reviewing the matters *in extenso*. I am of the opinion, however, that the contracts of June 11, 1912, and the subsequent oral construction thereof, together with the understanding prevailing among all concerned, should be held to protect those mentioned in such contracts and who furnished materials that went into the construction of the cars. The questions are not free from difficulty but if error be made I prefer to err in favor of those who acted in good faith in furnishing materials under the belief that they were protected by the contracts in question.

The orders sought to be reviewed are, therefore, reversed. April 28th, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: At 5 o'clock and — min. P. M.
Filed Apr. 22, 1914. W. B. Maling, Clerk. By T.
L. Baldwin, Deputy Clerk. [49]

(Title of Court and Cause.)

**Petition for Appeal by Trustee in Bankruptcy and
Order Allowing Appeal.**

H. Van Luven, Esq., the trustee of the estate of the above-named bankrupt, considering himself aggrieved by the order of the above-entitled court made and entered herein on the 28th day of April, 1914, in the above-entitled matter, reversing the order of A. B. Kreft, Esq., a referee in bankruptcy of the said court, awarding to the said trustee in bankruptcy as against the Judson Manufacturing Company and M. Greenberg's Sons the sum of \$3,682.82, held by the City and County of San Francisco, a municipal corporation, as stakeholder between the said trustee in bankruptcy and the said Judson Manufacturing Company and M. Greenberg Sons, does hereby appeal from said order of the said Court to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated, June 19th, 1914.

HENRY G. W. DINKELSPIEL,
J. M. THOMAS,
REUBEN G. HUNT,

Attorneys for H. Van Luven, Trustee in Bankruptcy
of W. L. Holman Company, a Corporation.

The foregoing appeal is allowed.

Dated, June 19th, 1914.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed Jun. 19, 1914, at 9 o'clock and
50 min. A. M. W. B. Maling, Clerk. By C. W.
Calbreath, Deputy Clerk. [50]

(Title of Court and Cause.)

Assignment of Errors on Appeal.

And now on this, the 19th day of June, 1914, comes H. Van Luven, Esq., as trustee in bankruptcy of the estate of W. L. Holman Company, a corporation, by Henry G. W. Dinkelspiel, J. M. Thomas and Reuben G. Hunt, his attorneys, and says that the order in the above-entitled matter made and entered herein on the 28th day of April, 1914, reversing the order of A. B. Kreft, Esq., a referee in bankruptcy of said court, awarding to the said trustee in bankruptcy as against the Judson Manufacturing Co. and M. Greenberg's Sons the sum of \$3,682.82 held by the City and County of San Francisco, a municipal corporation, as stakeholder between the said trustee in bankruptcy and the said Judson Manufacturing Co. and M. Greenberg's Sons, is erroneous and against

his just right for the following reasons:

(1) The evidence upon which the said order of the referee is based shows that the said Judson Manufacturing Co. and M. Greenberg's Sons', and each of them, have no right, title or interest in the said sum of \$3,682.82, or any part thereof.

(2) The evidence upon which the said order of the referee is based shows that the said Judson Manufacturing Co. and M. Greenberg's Sons have no lien, either legal or equitable upon the said sum of \$3,682.82, or any part thereof. [51]

(3) The evidence upon which the said order of the referee is based shows that the said Judson Manufacturing Co. and M. Greenberg's Sons have no right, title or interest in the said sum of \$3,682.82, or any part thereof, as against the said trustee in bankruptcy.

(4) The evidence upon which the said order of the referee is based shows that the said Judson Manufacturing Co. and M. Greenberg's Sons, and each of them, have no lien, either legal or equitable, upon the said sum of \$3,682.82, or any part thereof, as against the said trustee in bankruptcy.

(5) The evidence upon which the said order of the referee is based shows that the said sum of \$3,682.82 belongs to the estate of the bankrupt for the benefit of the general unsecured creditors of the bankrupt, and that the title is in the said trustee in bankruptcy.

(6) The evidence upon which the said order of the referee is based shows that the said Judson Manufacturing Company and M. Greenberg's Sons are not secured creditors of the bankrupt, as to the said

sum of \$3,682.82, or any part thereof, but are general unsecured creditors of the bankrupt as to the said sum.

(7) The evidence upon which the said order of the referee is based shows that no assignment, either legal or equitable, was ever made by the bankrupt to the Pacific Coast Casualty Co. for the benefit of its creditors furnishing material or labor for the construction of the Geary Street cars.

(8) The evidence upon which the said order of the referee is based shows that no assignment, legal or equitable, was ever made by the bankrupt for the benefit of its creditors, or any of them.

(9) The evidence upon which the said order of the referee is based shows that the title to the said sum of [52] \$3,682.82 was in the Union Iron Works Co., and not in the bankrupt, at the time the said Judson Manufacturing Co. and M. Greenberg's Sons filed their stop notices with the City and County of San Francisco against the bankrupt as to the said sum.

WHEREFORE, the said H. VAN LUVEN, as such trustee, prays that the said order of the District Judge may be reversed.

HENRY G. W. DINKELSPIEL,
J. M. THOMAS,
REUBEN G. HUNT,

Attorneys for H. Van Luven, Trustee in Bankruptcy
of the W. L. Holman Company, a Corporation.

[Endorsed]: Filed Jun. 19, 1914, at 9 o'clock and
50 min. A. M. W. B. Maling, Clerk. By C. W. Cal-
breath, Deputy Clerk. [53]

(Title of Court and Cause.)

Citation on Appeal (Copy).

The United States of America,
Ninth Circuit,—ss.

To Judson Manufacturing Company and M. Greenberg's Sons, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City and County of San Francisco, in said district, on the 18th day of July next, pursuant to a petition for appeal and assignment of errors filed in the clerk's office of the District Court of the United States for the Northern District of California, First Division, in the above-entitled matter, to show cause, if any there be, why the order of the said District Court rendered in the said matter and made and entered herein on the 28th day of April, 1914, reversing the order of A. B. Kreft, Esq., a referee in bankruptcy of the said court, awarding to the said trustee in bankruptcy as against the said Judson Manufacturing Company and M. Greenberg's Sons the sum of \$3,682.82 held by the City and County of San Francisco, a municipal corporation, as stakeholder between the said trustee in bankruptcy and the said Judson Manufacturing Company and M. Greenberg's Sons, as in said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [54]

Witness the Honorable M. T. DOOLING, Judge of

said District Court, this 19th day of June, in the year of Our Lord one thousand nine hundred and fourteen, and of the independence of the United States of America the one hundred and thirty-eighth.

M. T. DOOLING,

United States District Judge.

Receipt of a copy of the foregoing Citation on Appeal is hereby admitted this 19th day of June, 1914.

S. ROSENHEIM,

Attorney for the Said Judson Manufacturing Co.
and M. Greenberg's Sons.

[Endorsed]: Filed Jun. 19, 1914, at 2 o'clock and 30 min. P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [55]

Certificate of Clerk District Court to Transcript.

I, W. B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing and hereto attached 55 pages, numbered from 1 to 55, inclusive, contain full, true, and correct copies of certain documents and records, etc., as the same now appear on file (with the exception of the Petition for Review of order of Referee, and Order of Referee on Treasurer of San Francisco to Pay Money to Trustee, which were originally filed with the Referee in Bankruptcy, and transmitted to this office with and as a part of Certificate of Referee on said Petition for Review), all of which are now of record in this office, in the matter of W. L. Holman, a corporation, in Bankruptcy, No. 7,936. Said Transcript of Appeal

is made up pursuant to and in accordance with "Praecipe for Transcript of Record for Use on Appeal" and "Stipulation for Diminution of Record" (copies of which are included in this Transcript), and the instructions of Reuben G. Hunt, Esquire, Attorney for Appellant herein,—H. Van Luven, Trustee of said estate.

I further certify that the costs of preparing and certifying the foregoing Transcript of Appeal is the sum of Twenty-seven Dollars and Ninety Cents (\$27.90), and that the same has been paid to me by the attorney for appellant herein.

Annexed hereto and paged 57, 58, and 59, is the original Citation on Appeal issued herein.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court this 16th day of July, A. D. 1914.

[Seal]

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk. [56]

Citation on Appeal (Original).

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 7936—IN BANKRUPTCY.

In the Matter of W. L. HOLMAN COMPANY, a
Corporation,

Bankrupt.

CITATION ON APPEAL.

The United States of America,
Ninth Circuit,—ss.

To Judson Manufacturing Company and M. Greenberg's Sons, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City and County of San Francisco, in said district, on the 18th day of July next, pursuant to a petition for appeal and assignment of errors filed in the clerk's office of the District Court of the United States for the Northern District of California, First Division, in the above-entitled matter, to show cause, if any there be, why the order of the said District Court rendered in the said matter and made and entered herein on the 28th day of April, 1914, reversing the order of A. B. Kreft, Esq., a referee in bankruptcy of the said court, awarding to the said trustee in bankruptcy as against the said Judson Manufacturing Company and M. Greenberg's Sons the sum of \$3,682.82 held by the City and County of San Francisco, a municipal corporation, as stakeholder between the said trustee in bankruptcy and the said Judson Manufacturing Company and M. Greenberg's Sons, as in said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [57]

Witness the Honorable M. T. DOOLING, Judge of said District Court, this 19th day of June, in the year of Our Lord one thousand nine hundred and

fourteen and of the independence of the United States of America, the one hundred and thirty-eighth.

M. T. DOOLING,

United States District Judge.

Receipt of a copy of the foregoing Citation on Appeal is hereby admitted this 19th day of June, 1914.

S. ROSENHEIM,

Attorney for the Said Judson Manufacturing Co.
and M. Greenberg's Sons. [58]

[Endorsed]: No. 7936. In the District Court of the United States, Northern District of California. In the Matter of W. L. Holman Company, a Corporation, Bankrupt. Citation on Appeal. (Judson Mfg. Co. & M. Greenberg's Sons). Filed Jun. 19, 1914, at 2 o'clock and 30 minutes P. M. W. B. Mal-
ing, Clerk. By Lyle S. Morris, Deputy Clerk. [59]

[Endorsed]: No. 2446. United States Circuit Court of Appeals for the Ninth Circuit. H. Van Luven, as Trustee in Bankruptcy of the Estate of W. L. Holman Company, a Corporation, a Bankrupt, Appellant, vs. Judson Manufacturing Company and M. Greenberg's Sons, Appellees. In the Matter of W. L. Holman Company, a Corporation, Bankrupt. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Received and filed July 17, 1914.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

